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Concurrence in European Private Law

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List of Abbreviations

AC	The Law Reports, Appeal Cases (reports of court decisions, United Kingdom)
A-G	Advocate-General
Art.	Article
BGB	*Bürgerliches Gesetzbuch* (Civil Code, Germany)
BGH	*Bundesgerichtshof* (Federal Court of Justice, Germany)
BGHZ	*Entscheidungen des Bundesgerichtshofs in Zivilsachen* (reports of decisions delivered by the Federal Court of Justice concerning civil law, Germany)
Bull. civ.	*Bulletin civil de la Cour de Cassation* (reports of decisions delivered by the Supreme Court concerning civil law, France)
BW	*Burgerlijk Wetboek* (Civil Code, the Netherlands)
Cass.	*Cour de cassation* (Court of Cassation, France)
Cass. 1e civ.	*Cour de cassation*, 1ère Chambre Civile (First Civil Law Chamber of the Court of Cassation, France)
Cass. 2e civ.	*Cour de cassation*, 2ème Chambre Civile (Second Civil Law Chamber of the Court of Cassation, France)
Cass. 3e civ.	*Cour de cassation*, 3ème Chambre Civile (Third Civil Chamber of the Court of Cassation, France)
Cass. Ass. Plén.	*Assemblée plénière de la Cour de cassation*
Cass. ch. Réun.	*Les chambres réunies de la Cour de cassation*
Cass. Req.	*La chambre des requêtes de la Cour de cassation* (Chamber of admission, Court of Cassation, France)
CC	*Code Civil* (Civil Code, France)
cf.	*confer* (compare)
Ch	Chancery Division of the High Court (United Kingdom)
CJEU	Court of Justice of the European Union
DCFR	Draft Common Frame of Reference
EC	European Communities
ECR	European Court Reports
EEC	European Economic Community
e.g.	*exempli gratia* (for example)
et seq.	*et sequentes* (and the following)
EU	European Union
EWCA	England and Wales Court of Appeal (United Kingdom)
HL	House of Lords (United Kingdom)
HR	*Hoge Raad der Nederlanden* (Supreme Court of the Netherlands)
ibid.	*ibidem* (in the same place)

i.e.	*id est* (in other words)
NJ	*Nederlandse Jurisprudentie* (reports of court decisions, the Netherlands)
NJW	*Neue Juristische Wochenschrift* (law journal, Germany)
OJ	Official Journal of the European Union
QB	Queen's Bench Division (United Kingdom)
Rv.	Wetboek van burgerlijke rechtsvordering (Code of Civil Procedure, the Netherlands)
supra	above
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UKSC	United Kingdom Supreme Court
WLR	Weekly Law Reports, United Kingdom

1 General Introduction

1.1 An old discourse and a new debate

Private relationships are governed by many different rules, ranging from open-textured standards of general application to detailed rules aimed at specific situations. It is not unusual for a single set of facts to fall within the ambit of multiple rules nor is it uncommon that, on the face of it, several rights and duties arise concurrently. At first glance, a contracting party may, for instance, be entitled to demand specific performance of the obligations under the contract, to rescind the contract for pre-contractual misrepresentation, to terminate the contract for breach, and to recover the losses resulting from the breach. In some jurisdictions, moreover, the contracting party may also be entitled to claim damages for losses resulting from a violation of one or more tortious duties by the other contracting party.

Such a concurrence of rights and duties does not give rise to problems as long as the application of the underlying rules produces the same outcome. Yet the rules may vary in certain ways, both in terms of their conditions and in terms of their consequences, which may lead to different outcomes. In such situations, the question that arises is whether the law permits the interested party to elect the rule of his choice. This question can only be answered by considering the relationship between the underlying rules. Does one legal rule affect the scope of application of another legal rule? Can the rules be applied cumulatively, or must one of them be excluded in favour of the other? Does the law permit a choice between the rules?

These questions have kept scholars occupied for a long time. Early examples can be found in the works of medieval scholars who sought to systemise Roman law on the basis of the inherited *Corpus Iuris Civilis*. They wondered whether a person is permitted, after having instituted legal proceedings against another person, to abandon the *actio* he initially relied upon in favour of another, more advantageous, *actio*.[1] The same question was examined again by German scholars in the course of the 19th and early 20th century. The works of Ernst Levy (1881-1968) stand out. He wrote several books about the relationship between a wide range of *actiones*, pushing historical research in this field to its doctrinal peak.[2] At the time,

1 See Bezemer 2007, who submits that Azo of Bologna († ca. 1220-1230) was the first to examine this question under the header *cumulatio actionis*. The quotation referred to by Bezemer can be found in Dolezalek 1985, p. 600 (no. 338).

2 Levy 1918; Levy 1922; Levy 1962.

Roman law had already disappeared as a source of applicable law on the continent, due to the adoption of the national codifications of civil law in the course of the 19th and early 20th century. Henceforth, scholars increasingly devoted their attention to the relationships between the statutory rules collected in these codifications.

Over the past decades, their questions have acquired a new dimension as the result of the proliferation of the laws of the European Union and their increased impact upon the legal relationships between private parties. In a long line of leading cases, the Court of Justice of the European Union has established that individuals are under a duty towards other individuals to comply with certain provisions contained in the Treaty on the Functioning of the European Union and in the Charter of Fundamental Rights of the European Union, and with certain general principles of Union law. Rights and duties have also been laid down by the Union legislature in directives and regulations governing areas as diverse as social policy, consumer protection, competition law, transport, public health, and the internal market more broadly. It is not unusual for a single set of facts to fall within the ambit of multiple Union rules nor is it uncommon that, on the face of it, national laws may provide protection as well.

The concurrence of these rules is often understood and explained on the basis of several fundamental assumptions. The first is that Union laws have precedence over national laws. In its famous ruling in the case *Flaminio Costa v. ENEL*, the Court of Justice rendered it impossible for the Member States 'to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity'.[3] In subsequent cases, the Court has made it very clear that the validity of Union law cannot be challenged by relying upon national laws, regardless of their date of coming into force or their constitutional importance. In its view, any binding norm of Union law takes precedence over any provision of national law.[4] This principle of primacy is an essential feature of the European legal order.[5] It safeguards the consistency and uniformity in the interpretation and application of Union law through the subordination of Member State law and through the concomitant duty imposed on the national courts to apply Union law in its entirety and to protect the rights that it confers on individuals.[6]

The second assumption is that harmonising measures replace national laws. One of the core objectives of the European Union is to establish an internal market in which goods, persons, services, and capital can move

3 Case 6/64, *Flaminio Costa v. ENEL*, ECLI:EU:C:1964:66.

4 Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, ECLI:EU:C:1978:49; Opinion 1/09 of the Court, [2011] ECR I-1137.

5 Opinion 1/91 of the Court, [1991] ECR I6079, at 21; Opinion 1/09 of the Court, [2011] ECR I-1137, at 65; Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, ECLI:EU:C:2013:107, at 59.

6 Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, ECLI:EU:C:1978:49, at 14-16.

freely between the Member States.[7] One of the means to achieve this objective is to introduce Union legislation which removes barriers to economic integration originating from divergences in 'the provisions laid down by law, regulation or administrative action in Member States'.[8] Such harmonisation or approximation is aimed at creating a 'level playing field' on which economic actors can compete under equal conditions.[9] For this reason, it is assumed that directives and regulations adopted by the Union legislature introduce a uniform legal regime embracing all the Member States and preempt Member State competence to maintain its own laws or introduce new provisions that might deviate from that regime.[10]

The third assumption is that specific rules have precedence over general rules. This maxim, well-known by the Latin phrases *lex specialis derogat legi generali* and *specialia generalibus derogant*, has become part of the established repertory used to interpret the laws of the European Union.[11] It is assumed, for instance, that the treaty provisions concerning the free movement of persons and services set aside the general prohibition of discrimination on grounds of nationality,[12] that provisions of primary Union law can be relied upon only in the absence of more specific harmonising measures adopted by the Union legislature,[13] and that directives and regulations apply only in the absence of harmonising measures more specific in scope.[14] Conway has even gone so far as to argue that the concurrence of Union rules is unwelcome and should best be avoided through a rational application of the *lex specialis* principle. In the interest of providing legal certainty, a specific rule should always prevail over a general rule if both relate to the same subject matter.[15]

Each of these fundamental assumptions has long been established. Libraries are filled with books about the relationship between Union laws

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7 Art. 26 (2) TFEU.

8 This formulation is used in Art. 114 (1) TFEU, the provision which forms the basis of most directives and regulations in the area of the internal market. Such barriers can also be removed through negative integration, that is through the removal of national laws that discriminate against goods, persons, services, and capital from other Member States or render market access more difficult. In such situations, however, national laws are not replaced by Union laws. See, on negative integration, Weatherill 2017, p. 5-10.

9 Weatherill 2017, p. 10-13.

10 See e.g. Dougan 2000, p. 854, who observes that the approximation of national law by the Union 'is often stereotyped in terms of a model of "total harmonization"'.

11 Beck 2012, p. 222-223.

12 See e.g. Böhning 1973, p. 82; Davies 2003, p. 188; Van den Bogaert 2005, p. 121; Hartkamp 2011, p. 164-165; Krenn 2012, p. 193; Veldhoen 2013, p. 370-371; McDonnell 2018, p. 438.

13 Known as the *Tedeschi* principle. In Case 5/77, *Carlo Tedeschi v. Denkavit Commerciale*, ECLI:EU:C:1977:144, the Court held that where directives provide for the harmonisation of objectives of general interest, recourse to nowadays Article 36 TFEU 'is no longer justified'. On this basis, scholars have concluded that provisions of primary law apply only in the absence of more specific secondary legislation. See e.g. Mortelmans 2002, p. 1328; De Vries 2008, p. 575; Tobler 2013, p. 458; Koffeman & Rijpma 2014, p. 466; Cuyvers 2017, p. 299.

14 See e.g. Anagnostaras 2010, p. 153; Garde 2012, p. 137, on the scope of application of the Unfair Commercial Practices Directive.

15 Conway 2012, p. 156.

and national laws, and between general rules and specific rules. In fact, a host of examples shows that Union laws have the capacity to set aside or replace the provisions laid down by national laws, and that specific rules have the capacity to set aside general rules. However, a mode of analysis based exclusively on these fundamental assumptions will encounter certain difficulties when it seeks to understand and explain the relationship between concurrent rights and duties. For Union laws do not necessarily set aside or replace the provisions laid down by national laws, and specific rules do not necessarily trump general rules. The question as to *whether* one rule affects the scope of application of another rule, so this book aims to demonstrate, is a question of interpretation which cannot be answered on the basis of these fundamental assumptions alone.[16]

Inspired by the experiences gained from examining several national systems of private law, this book offers a different scheme of analysis. It starts from the premise that each applicable rule, however founded, should be realised to the greatest possible extent. In principle, then, each rule ought to have its intended legal effect once the necessary conditions have been established. Two exceptions must be made, however. An election between the available alternatives is required if cumulative application would lead to inconsistent outcomes which cannot exist concurrently. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. For the same reason, the law sometimes prescribes that one of the rules applies exclusively, so that no election can be made at all.

This scheme of analysis accepts and accommodates the situations in which Union laws replace or exclude national laws, and the situations in which specific rules set aside rules more general in scope. Crucially, the scheme also absorbs the many situations in which rules do apply concurrently and provides a model by which the questions which may arise as a result of their overlap can be debated and solved. By developing this scheme of analysis, the book purports to provide a complete and nuanced account of the impact of the laws of the European Union and their interaction with the national systems of legal protection.

1.2 Different visions of the structure of the legal system

This scheme of analysis offers a host of doctrinal issues and emerging novelties, relevant to scholars and practitioners of private law and Union law alike. But they have not yet received the attention they deserve. Scholars specialised in private law, it is true, have taken some initial steps. But their

16 Cf. Schütze 2006, p. 1023, who distinguishes between the doctrine of 'pre-emption', which determines whether a conflict between two norms exists, and the doctrine of 'supremacy', which determines which norm prevails in the event of conflict.

contributions are either not written in English,[17] or they use the national civil code as a point of reference and view the Union laws from this particular angle.[18] Meanwhile, scholars specialised in Union law have built up a rich body of academic discourse which has flourished alongside unfolding case law and newly adopted directives and regulations. But this scholarship does not generally focus on the relationships between private parties, but on the division of competences between the Union and its Member States.

What is the reason that scholars of private law and Union law are talking at cross-purposes? One reason is that they tend to view the structure of the legal system from different angles. Many jurists specialised in private law, especially continental scholars, are thinking in terms of the so-called 'institutional' model inherited from Roman jurists. By contrast, many scholars specialised in Union law are thinking in terms of the structure of the legal order conceptualised by Hans Kelsen (1881-1973). It is important to consider how these models differ from each other before determining the perspective which should be adopted in this book.

The 'institutional' model forms the foundation of the continental codifications of civil law. Its basic structure originates from the works of the 2nd century jurist Gaius, who was the first to subdivide Roman law into the law of persons, things, and actions.[19] His structure was later adopted by the writers of the *Institutiones*, the textbook which served as an introduction to the codification ordered by the 6th century emperor Justinian I.[20] Book Four of the *Institutiones* dealt with different types of actions, such as the *actiones in rem*, which could be used to assert a property right, and the *actiones in personam*, which could be used to enforce a personal obligation. This *summa divisio*, between the laws of obligations and things, is a core feature still to be found in every modern codification of civil law, including the French *Code Civil* (1804), the German *Bürgerliches Gesetzbuch* (1900), and the Dutch *Burgerlijk Wetboek* (1992). The distinction between personal rights and real rights has even found its way to the common law, through Hale's *The History and Analysis of the Common Law of England* (1713) and Blackstone's *Commentaries on the Laws of England* (1765-69).[21]

What is important to understand, for present purposes, is that these works share a common objective. Contemporary codifications of civil law and the accompanying scholarship – but also certain commentaries on

17 E.g. Baldus 1999; Huber 2001; Gruber 2004, p. 229-258; Lerche 2007; Goldie-Genicon 2009; Sieburgh 2009; Bachmann 2010; Hartkamp 2011; Veldhoen 2013; Castermans & De Graaff 2013; De Graaff 2014b; Laroche 2014; Castermans & Krans 2019.

18 E.g. Baldus 1999 (who also examines Roman law); Huber 2001; Lerche 2007; Goldie-Genicon 2009; Bachmann 2010; Hartkamp 2011; Castermans & De Graaff 2013; Veldhoen 2013; De Graaff 2014a; Castermans & De Graaff 2014; Laroche 2014; Castermans & Krans 2019.

19 Watson 1994, p. 5; Zimmermann 1996, p. 25-26.

20 Watson 1994, p. 8; Zimmermann 1996, p. 27.

21 Hale 1713; Blackstone 1765. The influence of the Justinianian model on the works of Hale and Blackstone is examined by Simpson 1981, p. 640-641; Watson 1988, p. 799-812.

the common law[22] – aim at covering the rules and institutions relevant to private relationships in a comprehensive and systemic way. They use a conceptual model to describe and classify the world of persons and things and define the relations between them. The precise contents of the resulting models may differ over time and across jurisdictions, but their common objective is to cover the relevant aspects of the factual reality, so as to enable the resolution of any legal dispute between private parties arising in the real world. Such institutional systems, Samuel summarises, aim 'to create a legal image of social reality in such a way that legal rules – legal norms – can be meaningfully applied'.[23]

Hans Kelsen did not seek to provide a comprehensive theory which can be used to understand the world of persons and things. In fact, he wanted to emancipate his *Pure Theory of Law* from 'alien elements' such as theology and the natural sciences. To that end, he developed a model which can be used to assess whether a norm – that is 'an act by which a certain behavior is commanded, permitted, or authorized'[24] – is 'valid' in the sense that a person ought to behave in a certain way.[25] How to determine whether an act produces such legal consequences? The answer to this question is straightforward: a norm can be valid only if it rests upon another norm which, ultimately, must be validated by the 'basic norm' or *Grundnorm*, the validity of which is presupposed.[26] It is clear that institutional models cannot be used in order to understand this vertical structure. Nor is the distinction between private and public law relevant as such. What matters is whether a norm – such as a rule contained in a civil code – can be validated, ultimately, by the basic norm. It flows from this reasoning that any inconsistency between a higher norm and a lower norm will render the latter invalid.[27]

Union law can be viewed from this perspective. At the top of the pyramid, we encounter the constituent treaties: the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).[28] Since the entry into force of the Lisbon Treaty in 2009, the same rank has been awarded to the Charter of Fundamental Rights of the EU.[29] The second tier is formed by the general principles of Union law, such as proportionality, legal certainty, and equality.[30] The third tier is formed by the legislative acts adopted by the Union legislature pursuant to the relevant procedures.[31] At the bottom of the pyramid, we find the delegated

22 E.g. Burrows 2013.
23 Samuel 2014, p. 101.
24 Kelsen 1967, p. 5.
25 Kelsen 1967, p. 10.
26 Kelsen 1967, p. 193-195.
27 Kelsen 1967, p. 208 and 267-268.
28 Art. 1 TEU.
29 Art. 6 (1) TEU.
30 Craig & De Búrca 2015, p. 111-113.
31 Art. 289 TFEU.

and implemented acts adopted on the basis of Articles 290 and 291 TFEU.[32] In fact, the very principle of primacy of Union law over national law can be considered a straightforward application of the monist theory developed by Kelsen, who regarded national and international law 'as a unity' and argued that the latter is superior to the former.[33]

Useful as the Kelsen model may be to understand the hierarchical structure (or *Stufenbau*) of the Union legal order and its primacy over national laws, it tells us nothing about the legal effects of these rules. This is unfortunate, for there is much more to Union law than knowing whether a rule is 'valid' or 'invalid'.[34] Union law also confers rights and duties, not only on public bodies but also on private parties. This becomes clear if we take a brief look at the doctrinal debate about the direct effect of Union law in the national legal orders. Although scholars quarrel about the exact definition,[35] it is widely accepted that Union law may not only be applied as a standard to review the legality of national law, but may also serve as a source of rights and duties (often called obligations).[36] The meaning of these terms changes accordingly. On the one hand, the term 'right' is used, not least by the Court of Justice itself,[37] to refer to a general right to 'rely on' Union law, which corresponds to a duty on the courts to apply Union law and, if need be, to set aside conflicting national laws in the cases arising before them.[38] On the other hand, the term 'right' is used to indicate a more specific entitlement of an individual against one or more others, such as restitution, specific performance or compensation.[39]

If the Kelsen model cannot provide us with an adequate picture of the rights and duties Union law confers upon individuals, should we then resort to the 'institutional' model? The question that immediately arises is which institutional model. As mentioned, all modern civil codes aim to provide a comprehensive and systemic overview of private law. But they do not necessarily adopt the same style or structure. In fact, comparative lawyers are used to dividing the world's legal systems into legal families; two of which are of French and German origin.[40] One important reason for distinguishing between these two systems lies in the differences between

32 Craig & De Búrca 2015, p. 114-120.
33 Kelsen 1967, p. 328-344.
34 This point has also been stressed by scholars specialised in private law, such as Hartkamp (e.g. in Hartkamp 2013, p. 194) and Sieburgh (e.g. in Sieburgh 2013, p. 1172-1173).
35 As will be discussed in section 4.2, scholars have constructed a narrow and a broad definition of direct effect.
36 See e.g. Prechal 2005, p. 241; Dougan 2007, p. 933-934, 937-938; De Witte 2011, p. 331; McDonnell 2018, p. 430-431.
37 E.g. in Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung*, ECLI:EU:C:2018:257, at 76 and 78; Case C-68/17, *IR v. JQ*, ECLI:EU:C:2018:696, at 69.
38 Prechal 2005, p. 100.
39 Van Gerven 2000, p. 507; Prechal 2005, p. 97; Craig & De Búrca 2015, p. 186.
40 Esmein 1900, p. 495; Arminjon, Nolde & Wolff 1951, p. 47; Schnitzer 1961, p. 189-248; Zweigert & Kötz 1992, p. 69-75; Van Hoecke 2015, p. 24-26. See also the overview of legal family classifications across time provided by Siems 2014, p. 76.

the *Code Civil* and the *Bürgerliches Gesetzbuch*. The *Code Civil* is modelled on the system of Gaius,[41] although it must be noted that its third book is not dedicated to actions but contains residual rules on a range of different subjects. The *Bürgerliches Gesetzbuch* is more abstract and technical in nature. It consists of five books: a general part containing the rules common to the whole of private law, and separate books about obligations, things, family law, and succession. This system, also known as the *Pandektensystem*, uses a 'formal legal technique with extremely clear-cut concepts which, far from forming the basis of a thorough codification in France, whose traditions look more to the political and forensic spheres, had hardly any effect there at all'.[42]

Choosing one of these institutional models requires us to recast the other applicable laws in its terms. This surely is a task that is too complex and time-consuming to undertake. We would, moreover, immediately encounter a problem of comparative law methodology. For we risk imposing upon the other systems of private law and Union law a model which is not actually used to envisage the structure of the law in these systems.[43] We face the same problem if we rely upon the *Draft Common Frame of Reference* (DCFR) in order to understand the structure of the law. This is a comprehensive collection of principles, definitions, and model rules of European private law, compiled by a great number of jurists from far and wide over the course of several years.[44] But it is a compromise text which does not reflect the state of the law in any system of private law currently in force, has not been adopted by the Union legislature, relies upon categories and concepts which arguably lack flexibility,[45] and does not fully embrace the Union laws relevant to private parties,[46] because its underlying purpose is to build a new institutional system of private law in its own right.[47] Using the DCFR as a model may have the effect of causing us to lose sight of the very legal materials we wish to understand.

How to break this deadlock? How to understand the relationship between concurrent rights and duties without getting bogged down in a regression which ultimately leads back to the 'basic norm' or attempting to press the whole of the law into the moulds of yet another institutional

41 Watson 1994, p. 17.
42 Zweigert & Kötz 1992, p. 70.
43 See, generally, Samuel 2014, p. 6, 9, 63, 78, 130, and 147, who warns against 'legal imperialism'.
44 For an overview of the history of the project and its contributors and funders, see Von Bar, Clive & Schulte-Nölke 2009, p. 47-56.
45 Consider the criticism voiced by Marchetti 2012, p. 1274.
46 The DCFR only includes provisions contained in certain directives existing at the time of drafting, such as Council Directive 93/13/EEC on unfair terms in consumer contracts (II. – 9:401-410 DCFR).
47 Consider the criticism voiced by Ackermann 2018, p. 745-749, of the various collections of model rules and principles which have been produced by private-law scholars over the course of the past decades.

structure? The answer lies in the question this book aims to answer. If we wish to understand the relationship between concurrent rights and duties, our focus should be on the legal relations between persons and not on the institutional or hierarchical structure of the legal system. In other words, we should view the law from the perspective of the individuals involved.

1.3 This book's focus on legal relations

The theory developed by the American jurist Wesley Newcomb Hohfeld (1879-1918) can be helpful in order to express the questions we aim to answer and select the relevant cases and materials. Troubled as he was by the indiscriminate use of the words 'rights' and 'duties',[48] Hohfeld proposed a structure of eight 'correlative' concepts which can be arranged in two groups.[49] We will briefly explain these two groups by reference to their core concepts: *claims* and *powers*.

In its narrowest sense, Hohfeld argued, the term *right* (or *claim*) is used as the correlative of the term duty. If someone has a claim, another person is under a duty to behave in a certain way.[50] Examples are the claim for specific performance, the claim arising from undue payment, and the claim for compensation. From an analytical perspective, such a claim must be distinguished from a *power*, that is the capacity of a person to unilaterally create, modify or extinguish a legal position or relationship, and so to create, modify or extinguish claims and powers.[51] Examples are the termination of a contract for breach, the rescission of a contract for pre-contractual misrepresentation, and the possibility to extinguish a claim by setoff. The distinction between these core concepts – claims and powers – becomes apparent if we adopt the perspective of the person affected. Hohfeld demonstrated that this person is not under a duty to behave in a certain way, but is subjected to the liability that the power will be exercised. Hence, the correlative of a power is not a duty but a liability.[52]

Hohfeld's correlatives have been put to lots of different uses. Indeed, his model has become famous because it can be used to analyse the concepts existing in any legal system in terms of legal relations.[53] It does not come as a surprise, therefore, that the model has also been used by scholars specialised in Union law. They have relied upon Hohfeld's model in order to better apprehend the different claims and powers conferred upon individuals and the corresponding duties and liabilities imposed on other individuals and

48 Hohfeld 1913b, p. 28.
49 Lawson 1977, p. 2.
50 Hohfeld 1913b, p. 30-32; Hohfeld 1917, p. 717.
51 Hohfeld 1913b, p. 44-54.
52 As this is 'a well-known legal term with long-settled meanings', Pound 1959, p. 81, has suggested to use the term 'risk' instead.
53 Schlag 2015, p. 217-219.

on the Member States.[54] His model has also been valued by practitioners such as Advocate General Wahl, who used Hohfeld's idea that claims and duties correspond in order to support his conclusion that Union law – and not national law – determines the persons liable to pay compensation for losses resulting from an infringement of EU competition law.[55]

Another virtue of Hohfeld's scheme is that it allows us to examine the differences and similarities between legal systems without having to resort to the formal legal concepts used in those systems.[56] Hence, it enables us to perform the task we have in mind: namely to compare the national systems of private law and to value these insights as a source of understanding of the laws of the European Union. The question may be raised, however, whether we are not at risk of imposing yet another model which is not actually used to envisage the structure of the law in the systems under consideration.[57] Prechal, for one, has submitted that Hohfeld's analytical approach 'is *only one* school of thought, by origin Anglo-American'. In her view, his scheme 'does not necessarily link up with the way matters are conceived on the continent and in legal practice'.[58]

The fact that Hohfeld was an American jurist, who used examples from the common law and from equity and whose concepts still attract significant attention in the English-speaking world, should not lead us to believe that his theory is of Anglo-American origin. His guiding thesis – legal problems can only be understood in terms of legal relations – can be traced back to Friedrich Carl von Savigny (1779-1861)[59] and has also been embraced by Marcel Planiol (1853-1931).[60] When carving out his fundamental legal conceptions, moreover, Hohfeld built on the works of John William Salmond (1862-1924),[61] who adopted the distinction, made by Bernhard Windscheid (1817-1892),[62] between claims and powers.[63] The first

54 Coppel 1994; Hilson & Downes 1999; Gilliams 2000; Prechal 2000, p. 1057-1058; Eilmansberger 2004; Bengoetxea & Jääskinen 2010; Aalto 2011, p. 162-176; Bengoetxea 2012, p. 738-746; Lock 2019.

55 Opinion A-G Wahl, Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:100, at 61. The reference to Hohfeld 1913b can be found in footnote 28. The Court followed the Opinion on this point, see Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204, at 28.

56 Van Hoecke 1996, p. 194-197; Brouwer & Hage 2007, p. 5; Samuel 2014, p. 102-105; Van Hoecke 2015, p. 13-15.

57 Samuel 2014, p. 107.

58 Prechal 2000, p. 1058.

59 Von Savigny 1840b, p. 1: 'Jedes Rechtsverhältniß besteht in der Beziehung einer Person zu einer andern Person.' See also Von Savigny 1840a, p. 7.

60 Planiol 1928, p. 702: 'Par définition, tout droit est un rapport entre les personnes.'

61 Salmond 1902, p. 217-238.

62 Windscheid 1862, p. 81.

63 We should not conclude, therefore, that 'pandectist concepts are completely alien to England', as Vaquer 2009, p. 489 does. See, about the roots of Hohfeld's scheme, Kocourek 1920, p. 25; Pound 1959, p. 76-77; Frydrych 2018, p. 329-331.

concept has been developed by Windscheid himself[64] and still forms the backbone of the German Civil Code, which defines the claim – the *Anspruch* – as 'Das Recht, von einem anderen ein Tun oder Unterlassen zu verlangen (…)'.[65] The power of an individual to unilaterally create, modify or extinguish a legal position or relationship has been recognised as a separate legal concept ever since the contributions of Emil Seckel (1864-1924), who coined the term *Gestaltungsrecht*.[66] This concept is not as established in other continental jurisdictions, although it is not unusual for a Dutch writer to refer to *wilsrechten*[67] or for a French writer to refer to *droits potestatifs*.[68]

The basic components of Hohfeld's scheme, so it appears, are familiar to scholars across Europe.[69] Still, Prechal rightly observes that some matters are conceived differently on the continent. Importantly, views may differ as to the role of the courts. Do they enforce rights or do they award remedies? The traditional common law position is that a remedy is a 'cure' provided by a court of law. The court order reframes the right or even originally confers it: the remedy is said to precede the right (*ubi remedium ibi ius*). By contrast, civil lawyers assume that a judicial decision does not create a new right, but rather confirms its existence: the right is said to precede the remedy (*ubi ius ibi remedium*).[70] This does not mean that English law always requires recourse to the courts, nor that continental systems never require the courts to step in. In fact, English law does recognise the concept of 'self-help' remedies,[71] while some continental systems do attach more importance to judicial intervention than others.[72] But the reader should be aware that even though Hohfeld himself remained neutral as to whether or not rights exist outside the courts, views may differ in practice.[73] A common lawyer is used to the idea that the courts develop the law, whereas a civil lawyer traditionally assumes that the courts discover the law as it stands.[74]

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64 Windscheid 1856, p. 3-7.

65 § 194 (1) BGB.

66 Seckel 1903. See about this development Hattenhauer 2011, p. 197 et seq., and about the distinction between *Ansprüche* and *Gestaltungsrechte* Neuner 2012, p. 219-223.

67 Rupke 1914; Drielsma 1940; Drielsma 1946; Meijers 1948, p. 266; Suijling 1948, p. 102-107; Drielsma 1975; Mellema-Kranenburg 1988, p. 8; Snijders 1999; Nieuwenhuis 2007a, p. 52-53; Biemans 2011, p. 193-195; Bartels & Van Mierlo 2013, no. 2; Spierings 2016; Verheul 2017; Van Nispen 2018, p. 52-54, 59-61; Verheul 2018.

68 Najjar 1967, p. 100 et seq.; Bénac-Schmidt 1983, p. 114 et seq.; Pomart-Nomdedeo 2010; Lefer 2016. See also Vaquer 2009, p. 496-497, with references to Italian and Spanish law.

69 Van Gerven 1973, p. 90-94; Graziadei 2008, p. 84.

70 Dedek 2010 discusses the differences between these approaches from a historical and comparative perspective.

71 E.g. rescission for misrepresentation can be effected without a court order.

72 Hattenhauer 2011, p. 205 et seq.; Ebers 2016, p. 58-60. Until recently, for instance, the *Code civil* required the assistance of a court to nullify a contract because of mistake, fraud or duress (Art. 1117 CC). This requirement has been abolished by *Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* (hereinafter: *Ordonnance n° 2016-131*).

73 Barker 2018, p. 25-28.

74 Dedek 2010, p. 29-30.

One more point should be mentioned before we consider the questions and outline of this book. In line with Hohfeld's guiding thesis, we will not only pay attention to the active side of legal relations, but also to their passive side – that is, to the persons affected by the enforcement of a claim or the exercise of a power. These persons may contest the assertion that a claim exists or that a power has been lawfully exercised. In Hohfeld's words, they would argue that they are either entitled to a *privilege* or to *immunity*.[75] In this book, the term *defence* will be used to cover both situations, because this term is tailored to the dynamics of legal dispute. After all, it is a well-established rule in all jurisdictions that if a matter is taken to court, it is up to the claimant to allege the elements of the relevant rule of law in order to obtain the result sought.[76] He may not be required to mention the rule by its name, but he is required to demonstrate – by reference to the relevant standards of proof – that the facts that are necessary for a certain rule to become operative have occurred and that the court must, therefore, conclude that a claim exists or that a power has been lawfully exercised.[77] In turn, the defendant may be able to rely upon a defence. And just as a single set of facts can, on the face of it, give rise to multiple claims or powers, so too may several defences arise in a given case.[78] Their relationship should be considered in this book.

1.4 Questions and outline

The previous sections have explained why this book focuses on legal relations and have informed the reader about the kinds of rules – claims, powers, defences – which will be examined. However, this is only one part of our enquiry. Although Hohfeld's scheme may help us towards defining the basic categories, it does not tell us whether a right exists, let alone whether rights may exist concurrently. Such questions of interpretation cannot be answered by using his conceptual model.[79] Hohfeld was well aware of this: 'Whether there should be such concomitant rights (or claims)', he wrote, 'is ultimately a question of justice and policy; and it should be

75 Hohfeld 1913b, p. 36.

76 As noted by e.g. MacCormick 1978, p. 41-52. In most continental legal systems, this rule is laid down in statutory provisions (e.g. in France in Art. 1353 CC; in the Netherlands in Art. 150 Rv). In Germany, the rule goes by the name of the *Normentheorie* (Rosenberg 1956, p. 153).

77 Unless the claimant requests a declaratory decision that he is *not* under a legal duty towards the defendant, or that the exercise of a power by the defendant was *not* valid.

78 Already observed by Von Tuhr 1923, p. 18. The defence stage has received more scholarly attention in recent years: Nieuwenhuis 1997, p. 15-16; Bakels 2009a, p. 337; Neuner 2012, p. 242-245; Goudkamp 2013, p. 19-20, 202; Smith 2016; Martín-Casals 2019a, p. 769-776.

79 Van Gerven 1961, p. 2041 and 2051. See also the distinction made by Frydrych 2017, p. 125-131, between models and theories of rights.

considered, as such, on its merits.'[80] For this reason, this book does not only rely upon conceptual categories, but will also devote much attention to features of legal argumentation.

The principal question which this book aims to answer is whether the scheme of analysis conceived and fostered in the context of the national systems of private law can be valued as a source of understanding of the laws of the European Union. In the first part of the book, several national legal systems are examined and compared. What are the themes running through the various solutions to individual issues of concurrence? Our findings will equip us with the necessary tools to analyse the laws of the European Union. Can we see the same principles at work if we examine the statements of the Union legislature and the Court of Justice?

The outline of the book is as follows. Building on the current chapter, Chapter 2 identifies three categories of legal rules – claims, powers, and defences – which play a central role when resolving legal disputes between individuals in modern systems of private law. The chapter then considers the situation where these rules overlap. How to determine whether, and to what extent, one rule affects the scope of application of another rule? When, if at all, do specific rules have priority over general rules? The chapter examines and compares the approaches adopted in Dutch, English, French, and German law. Can we see the same principles at work in these legal systems?

Chapter 3 considers in greater detail the reasons underlying the decision to permit or restrict the availability of one legal rule because of the availability of another legal rule. It focuses on the issue which has been at the heart of the debate about concurrence in contemporary private law: the relationship between the laws of contract and tort. The question to consider is whether, and to what extent, the law permits a choice between finding liability in contract and in tort. The chapter examines how this question is answered in terms of Dutch, English, French, and German law. It traces the historical development of these approaches and explains their differences by looking at the underlying structure of these systems of private law. How to explain that only French law generally excludes the possibility to claim in tort if the damage is caused by or related to the performance, or non-performance, of a contractual obligation?

Having defined and examined our subject more accurately, we will shift our attention to the laws of the European Union. Chapter 4 first takes a step back and substantiates two underlying propositions. The first proposition is that Union law contains rules which are comparable to the rules we have examined in the previous chapters. In order to test this proposition, the chapter outlines the sources of Union law and their effects in the national legal orders. The chapter then investigates whether Union law equips individuals with claims, powers, and defences. The second proposition is that the objectives of each rule, regardless of its source, should be realised to the

80 Hohfeld 1913b, p. 36.

greatest possible extent. The chapter shows that this principle is not peculiar to the national systems of private law, but also enjoys support within the Union legal order.

In Chapters 5 and 6, we will venture on a more detailed examination of the laws of the European Union. Chapter 5 focuses on the relationships between three sets of provisions contained in the Treaty on the Functioning of the European Union (TFEU). Firstly, the chapter will analyse the relationship between claims and defences based on Article 101 TFEU, which deals with collusion between undertakings, and on Article 102 TFEU, which deals with the market conduct of dominant undertakings. Secondly, the chapter will investigate the relationship between claims and defences based on Article 18 TFEU, which prohibits any discrimination on grounds of nationality, on the one hand, and on the treaty provisions pertaining to the free movement of persons and services on the other hand. Thirdly, the chapter will examine the relationship between these free movement rules and the competition rules laid down in Articles 101 and 102 TFEU. The question to consider, in each case, is whether an individual is permitted to elect the rule which appears to him to be the most advantageous.

Chapter 6 examines the rules belonging to the body of secondary Union law. It focuses on the directives and regulations by which the Union legislature seeks to regulate the internal market. By their very nature, these directives and regulations are not wholly autonomous and self-contained. They will overlap with other directives and regulations, and they will be complemented by national laws. A single set of facts may, therefore, fall within the scope of multiple rules, belonging to the body of secondary Union law and to other sources of law. The question that arises is whether Union law permits an individual to elect the rule of his choice. The chapter examines how Union law answers this question by looking closely at the statements made by the Union legislature and by the Court of Justice.

Chapter 7 returns to the original research question and presents the final conclusions. An overview of the subsequent chapters is also presented.

1.5 Scope and methodology

The previous section has demonstrated that questions of concurrence arise within the law, as a result of overlaps between rules that are part of the law. They are not primarily policy issues that require an assessment of the relationship between legal rules and the broader socio-economic and cultural context in which these rules operate. This book is not, therefore, interdisciplinary in its approach. As a product of legal doctrinal research, the book analyses formal legal materials with the objective of revealing statements relevant to understand the legal questions raised.[81] Its immediate task will be to consult texts of treaties, codes and statutes, reports of

81 See, on the doctrinal method, e.g. Hutchison 2015, p. 131-132.

court decisions, and evidence of argumentation and reflections contained in scholarly publications. The book describes, defines, and compares these features and explains why they are fundamental. At the outset, the reader should, therefore, be informed as to the materials which have been examined and the materials which will not be discussed.

It is important to bear in mind that this book focuses on private parties and not on public bodies. To include public bodies would render the scope of the research too large and the materials too varied to properly formulate well-founded answers to the questions raised. We would be required to address the relationship between private law and administrative law, and the division of competences between civil courts and administrative courts, in each jurisdiction under consideration. This is a complex undertaking, not least because legal relationships with public bodies are principally governed by administrative law in some jurisdictions, but are also governed by private law in other jurisdictions. It might be interesting to examine whether the same principles apply when disputes between public bodies and private parties must be resolved, but this research seeks to remain neutral on this point and will focus only on the legal relationships between private parties.

It must be admitted at once that Union law itself does not distinguish clearly between the realms of private and administrative law. This does not mean, however, that the distinction between private parties and public bodies is unfamiliar. In fact, this distinction plays an important role when it comes to determining whether Union laws can be applied directly. In this context, a distinction is made between so-called 'vertical' and 'horizontal' direct effect. The question of whether a rule of primary or secondary Union law is directly effective may be answered differently, depending on whether the rule is relied upon against an individual or against an organ of the state.[82] As explained above, this book adopts the same distinction and focuses only on 'horizontal' relationships, not on 'vertical' relationships.

As a consequence, not all the rules of Union law are relevant in the context of this research. When examining the body of primary Union law, we will focus on certain directly effective treaty provisions in the area of competition law, free movement law, and non-discrimination law.[83] When examining the body of secondary Union law, regard will be had to the directives and regulations by which the Union legislature seeks to regulate the internal market.[84] The question may be raised as to whether we should examine directives at all. Directives cannot, in principle, create rights and impose duties on individuals, without national law serving as an intermediary.[85] However, many directives do spell out these rights and duties in great

82 Craig & De Búrca 2015, p. 184-224.
83 See further section 4.3.
84 See further section 4.4.
85 Exceptionally, directives may be relied upon to set aside national laws, but the threshold for such 'incidental' horizontal effect is high. See further section 4.2.

detail. Such directives can tell us much about the way Union law deals with issues of concurrence in relationships between private parties. They deserve to be examined in this book.

Even though the book focuses on the rules which are relevant in 'horizontal' relationships between private parties, the reader should be aware that these rules may also apply in the context of 'vertical' relationships. This is especially the case with certain treaty provisions pertaining to free movement law and non-discrimination law. In fact, these rules were traditionally held to apply only to measures adopted by Member States, and not to private conduct. Likewise, the competition rules, which were traditionally held to apply only to private undertakings, may – under certain circumstances – apply to Member States' behaviour. This means that a number of important judgments about the relationship between these treaty provisions have been rendered in proceedings involving public bodies, including judgments delivered in first instance proceedings before the General Court and in appeal proceedings before the Court of Justice.[86] These judgments will be discussed if they are necessary in order to find the appropriate answers in 'horizontal' relationships between individuals.

Another question arises as to the scope of our enquiry. Are we dealing only with bilateral or also with multilateral relationships? It is not unusual to jointly discuss both situations, as Lord Nicholls of Birkenhead does:

> 'The law frequently affords an injured person more than one remedy for the wrong he has suffered. (…) Cumulative remedies may lie against one person. A person fraudulently induced to enter into a contract may have the contract set aside and also sue for damages. Or there may be cumulative remedies against more than one person. A plaintiff may have a cause of action in negligence against two persons in respect of the same loss.'[87]

Laroche adopts a similar approach. She distinguishes *le concours matériel* from *le concours intellectuel*, depending on whether the damage has been caused by multiple persons or by just one person:

> 'Que plusieurs responsabilités soient envisageables car plusieurs personnes ont concurru à causer le dommage, et l'on parlera de concours matériel. Que plusieurs responsabilités convergent vers la réparation d'un même dommage, causé par un seul responsable, et l'on évoquera l'existence d'un concours intellectuel.'[88]

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86 Formerly known as the Court of First Instance, the General Court hears actions brought by individuals and Member States against acts or omissions of the institutions, bodies, offices or agencies of the EU (Art. 256 TFEU). Its decisions may be subject to an appeal before the Court of Justice. This book refers to the General Court when discussing cases decided by the Court of First Instance.

87 *Tang Man Sit (Deceased) v. Capacious Investments Ltd* [1996] A.C. 514 (PC); see also *United Australia Ltd v. Barclays Bank Ltd* [1941] A.C. 1 (HL). Weir 1984; Stevens 1996; Watterson 2003, and Cartwright 2017, p. 9-21, jointly discuss both situations too.

88 Laroche 2014, p. 13, referring to Leduc 2000.

However, most German scholars[89] have limited themselves to bilateral relationships.[90] Many Dutch writers,[91] and some English[92] and French[93] colleagues, have left multilateral relationships out of their accounts too. This restriction is to be preferred. Issues of joint and several liability have their own peculiarities and are typically governed by a specific statutory regime.[94] By contrast, it has largely been entrusted to the judiciary and to legal scholarship to solve issues of concurrence in bilateral relationships.[95] For these reasons, this book only focuses on such relationships.

Comparative studies about the general subject of concurrence in private law do not exist. Writers tend to focus on the rules belonging to their respective national legal systems and adjust their terminology accordingly. So an English lawyer writes about *remedies*,[96] a French lawyer about *actions en justice*,[97] and a German lawyer about *Ansprüche*.[98] Comparative studies on the relationship between the laws of contract and tort do exist, but they are either not written in English,[99] are somewhat outdated,[100] or they provide a comprehensive assessment of the law as it stands rather than an explanation of its development.[101] It is the aim of this book to add a current comparative account to these sources. French, German and English law have been selected because these are the most important private law systems in contemporary Europe, and because they represent both the civil and the common law traditions. Reference is also made to Dutch law given that this system has been influenced by the French Code Civil but has increasingly come under the influence of German law and legal doctrine.

Materials which have been published after 30 November 2019 have not been examined. This should not, however, lead the reader to believe that all the materials which have been published before that date will be expressly

89 Leaving aside writers who dealt with, or were heavily influenced by, Roman law, e.g. Von Savigny 1841, p. 204 et seq.; Windscheid & Kipp 1906, p. 608; Last 1908; Levy 1918; Liebs 1972.

90 E.g. Eisele 1892, p. 330-331; Lent 1912; Schmidt 1915; Dietz 1934; Georgiades 1968; Arens 1970; Schlechtriem 1972; Schlosser 1982; Larenz 1992, p. 154-158; Huber 2001; Gsell 2003; Neuner 2012, p. 238-242.

91 Boukema 1966; Snijders 1973; Nieuwenhuis 1982; Brunner 1984; Boukema 1992; Bakels 2009a; Castermans & Krans 2019, p. 6. Star Busmann 1972, p. 133, also discusses multilateral relationships.

92 Stevens 2007, p. 199.

93 Bussy-Dunaud 1988; Serinet 1996; Goldie-Genicon 2009; Borghetti 2010, p. 14-15.

94 Art. 1310 CC; § 420 et seq. BGB; Art. 6:6-6:15 BW; Civil Liability (Contribution) Act 1978.

95 As observed by Georgiades 1968, p. 64.

96 Cartwright 1991, p. 141-148; Stevens 1996; Edelman 2002; Watterson 2003; Cartwright 2017, p. 11-21.

97 Bussy-Dunaud 1988; Tournafond 1989; Pollaud-Dulian 1997; Jobard-Bachellier & Brémond 1999; Tricoire 2009.

98 Last 1908; Dietz 1934; Berger 1936; Dietz 1962; Georgiades 1968; Arens 1970; Bruns 1971; Gsell 2003; Schmidt 2006; Medicus & Lorenz 2015, § 33.

99 Schlechtriem 1972; Von Amsberg 1994; Kegel 2002; De Graaff & Moron-Puech 2017.

100 Weir 1984; Van Rossum 1995.

101 Von Bar & Drobnig 2004, p. 26-315; Martín-Casals 2019b.

mentioned. It is not the aim of this book to give an exhaustive description of every possible element in legal reasoning as concretely pursued in legislative texts, court decisions, and scholarly writing. It is, quite simply, impossible to examine all the legal materials dealing, in one way or another, with the concurrence of legal rules in private law and still discuss the topic with tolerable ease and sufficient clarity. Hence we will focus on the most relevant materials. This means, for instance, that most attention will be devoted to the decisions of the highest courts in the respective legal systems. As far as the interpretation of the laws of the European Union is concerned, we will focus on the judgments delivered by the Court of Justice and will not discuss the judgments delivered by national courts, even though these courts do play an important role within the judicial system of the European Union.[102]

102 As observed e.g. by Rosas 2012, p. 105.

2 Concurrence in Private Law

2.1 Introduction

Does one legal rule affect the scope of application of another legal rule? This question has been examined by scholars for a long time.[1] Yet the topic remains a minefield when it comes to terminology. Having spent one afternoon in the legal library of an English university, a diligent student will have found contributions about concurrent duties,[2] concurrent rights,[3] concurrent liabilities,[4] and concurrent remedies,[5] causing him or her to wonder whether or not the authors are writing about the same subject. And even if the authors do use the same term, one cannot be certain that they capture the same meaning. Birks has revealed, for instance, that the use of the term 'remedy' has 'at least five different meanings loosely grouped around the relationship between disease and medicine'.[6] The experiences of students searching the shelves of libraries of other European universities will not be very different. Scholars struggle with the relationship between formal recitals and underlying substance.

If understanding the taxonomy of a single legal system can be considered difficult, perhaps even dreadful, then comparing the categories used in different legal systems must be thought of as an ordeal of jargon and drudgery. Accepting these difficulties, the first aim of this chapter is nonetheless to attempt to explain what lawyers write about when they write about concurrence in private law. Given the ultimate objective of this book, which is to use these insights as an aid in the analysis of the laws of the European Union, we will not adopt the perspective of one particular system of private law currently in force. We will not, for instance, follow the terminology of the French *Code Civil* (1804), the German *Bürgerliches Gesetzbuch* (1900), or the Dutch *Burgerlijk Wetboek* (1992). Nor will we rely upon soft law instruments drafted by lawyers working in different jurisdictions, such as the *Draft Common Frame of Reference*.[7] Rather, we will draw on insights from analytical jurisprudence and theories of law in order to understand what these systems have in common. What kinds of legal rules play a central role

1 See also *supra* section 1.1.
2 Taylor 2019.
3 Stevens 2007, p. 199-217.
4 Weir 1984; Davies 2018b.
5 Stevens 1996; Watterson 2003.
6 Birks 2000, p. 1.
7 See *supra* section 1.2.

when adjudicating disputes between individuals in modern systems of private law (sections 2.2-2.3)?

Having defined our subject more accurately, we will then examine how different legal systems determine the relationship between these rules. To this end, this chapter will first subject the well-known maxim *lex specialis derogat legi generali* to close scrutiny. This maxim is often relied upon in order to explain that specific rules trump the application of rules more general in scope. But when is that really the case? On closer analysis, it appears that the question as to whether a specific rule trumps the application of a rule more general in scope is a question of interpretation which cannot be answered on the basis of this maxim alone. The chapter argues that we must take the substance of the rules into account, and not merely their formal relationship (section 2.4).

Drawing on insights from different legal systems, the chapter then proposes an alternative scheme of analysis. This scheme starts from the premise that each applicable rule, however founded, should be realised to the greatest possible extent. In principle, then, each rule ought to have its intended legal effect once the necessary conditions have been established. An exception must be made, however, if cumulative application would lead to inconsistent outcomes and when the law prescribes that one of the rules applies exclusively (section 2.5). In conclusion, the chapter summarises the themes running through the various solutions to individual issues of concurrence (section 2.6).

2.2 Concurrence of legal rules

No legal regime is wholly self-contained. No matter what structure is adopted when splitting up the law into separate branches, it is inevitable that some cases will fall within several of the branches devised. In German literature, this phenomenon is known as *Normenkonkurrenz* or *Konkurrenz der Rechtssätze*. Larenz gives the following definition:

> 'Die Tatbestände mehrerer Rechtssätze können sich in vollem Umfang oder teilweise decken, so daβ ein und derselbe Sachverhalt von ihnen erfaβt wird. Man spricht dann von einem Zusammentreffen oder einer Konkurrenz der Rechtssätze.'[8]

Likewise, Goldie-Genicon refers to the overlap of *règles de droit*:

> 'Le concours de normes se caractérise par la vocation de plusieurs règles de droit à régir une même situation de fait. Plusieurs normes présentent une aptitude égale à résoudre le même litige.'[9]

8 Larenz 1992, p. 154.
9 Goldie-Genicon 2009, p. 155.

These statements indicate that the overlap of legal *rules* lies at the heart of the phenomenon concurrence.[10] In order to better understand the nature of this phenomenon, it is therefore important to understand how legal rules operate. This can best be explained by contrasting them with another type of legal norm: *principles*.

Rules and principles differ in their application. A rule *must* have its intended legal effect once its conditions are fulfilled and *cannot* have effect if its conditions are *not* fulfilled.[11] Under Article 1240 of the French Civil Code, for instance, any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for the harm caused.[12] Principles do not create such an obligation, but they do play an important role in determining whether an obligation exists on the basis of Article 1240 CC. As Dworkin has stated, principles provide *reasons* to argue in favour or against a particular outcome, but they do not lead to a certain outcome if certain conditions are established.[13] This is why Alexy calls principles 'optimization requirements'. They 'require that something be realized to the greatest extent possible given the legal and factual possibilities'.[14]

Understanding this distinction is important in the context of this book, because conflicts of either rules or principles are resolved in fundamentally different ways. When principles collide, they have to be balanced against each other.[15] Ultimately, one principle will outweigh the other. Under certain circumstances, the freedom of contract may, for instance, be of greater weight than the principle of equal treatment. This does not mean that the principle of equal treatment carries no weight at all, but only that it carries less weight than the freedom of contract in the given case. Rules, by contrast, do not have a dimension of weight. They are applicable 'in an all-or-nothing fashion'.[16] This means that a conflict between applicable rules can only be solved by amending or excluding one of them. To stick to the example: a contractual clause is either valid or it is null and void because

10 This conclusion is also drawn by: Von Tuhr 1923, p. 17-18; Dietz 1934, p. 17; Meijers 1948, p. 161; Boukema 1966, p. 2; Georgiades 1968, p. 98-99; Snijders 1973, p. 454; Pels Rijcken 1980, p. 1101; Brunner 1984, p. 1; Weir 1984, p. 3; Boukema 1992, p. 3-4; Schmid 1996; Klein 1997, p. 18-19; Burrows 1998, p. 20; Huber 2001, p. 177; Harris 2002, p. 575-576; Gruber 2004, p. 229-258; Nieuwenhuis 2007b, p. 3; Bakels 2009a, p. 337; Tricoire 2009, p. 11; Burrows 2011; Mauchle 2012, p. 934; Neuner 2012, p. 239; Mauclair 2013; Laroche 2014, p. 12; Cartwright 2017, p. 11; Davies 2018b; Castermans & Krans 2019, p. 1-6.

11 Scholten 1974, p. 12-13; Dworkin 1977, p. 24; MacCormick 1978, p. 19-52; Larenz 1992, p. 138-145; Smith 2004, p. 153; Alexy 2010, p. 48.

12 Art. 1240 CC. This translation is based on the translation by John Cartwright, Bénédicte Fauvarque-Cosson & Simon Whittaker, see www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf.

13 Dworkin 1977, p. 25-26 and p. 72.

14 Alexy 2010, p. 47.

15 Dworkin 1977, p. 26-27; Alexy 2010, p. 49.

16 Dworkin 1977, p. 24.

it violates a rule that prohibits unequal treatment.[17] These outcomes are incompatible, so a choice must be made between them.

Here, the distinction between rules and principles is used for analytical purposes only. It is not our intention to suggest that the interpretation of legal rules is predetermined and fixed. There will be room for interpretation when deciding *whether* the facts fall within the scope of application of a legal rule and *whether* its conditions have been fulfilled.[18] Nor do we wish to suggest that rules will automatically be applied once their conditions have been fulfilled. Rules do not enforce themselves. Their application necessarily involves an exercise of choice by the parties concerned and by the courts who are, to some extent, bound by the facts stated by them.[19] The reader should be aware that the issue of concurrence may not arise if it has not been pleaded.[20]

Having established that the overlap of legal rules lies at the heart of the phenomenon of concurrence in private law, the next section will examine the kinds of rules which make up a modern system of private law. What kinds of rights and duties do they create?

2.3 Claims, powers, defences

The previous section examined the distinction between rules and principles, and explained that we are concerned with the concurrence of legal rules. And indeed, private relationships are governed by many different rules, from many different sources. Not all these rules, however, appear to be relevant in the present context. Therefore, this section will venture on an analysis of the kinds of rules which play a central role when adjudicating disputes between individuals in modern systems of private law.

According to one theory, articulated by John Austin (1790-1859) and endorsed by Hans Kelsen (1881-1973), the whole of the law – and thus of private law – can be reduced to rules which order individuals to do or not to do certain things. On this view, every rule 'properly so called' imposes a duty to obey a command on the threat of a sanction.[21] The attention is fixed on the rules which stipulate the sanction that follows in the event of non-

17 As stipulated by e.g. Art. 7:646 (11) BW.

18 This is uncontroversial (see e.g. Hart 1961, p. 12-13, 121-132; Scholten 1974, p. 7-12; Dworkin 1977, p. 81-130; MacCormick 1978, p. 36; Wiarda 1988, p. 19-31). It is a matter of contention whether these 'hard' cases should be decided on the basis of authoritative moral principles (Dworkin) or on the basis of authoritative social standards (Hart). It is beyond the scope of this section to consider this debate in detail.

19 As emphasised by, among others, Kelsen 1945, p. 81-83; Scholten 1974, p. 25; MacCormick 1978, p. 46-47.

20 See, among others, Guest 1961, p. 194-195; Nieuwenhuis 2007b, p. 1-6; Castermans & Krans 2009, p. 157-159; Bakels 2009a, p. 344; Burrows 2011, p. 3.

21 Austin 1880, p. 11-12; Kelsen 1945, p. 61.

compliance with a command.[22] Indeed, the threat of a sanction is essential. It surfaces again when Austin distinguishes 'primary' rights and duties from 'secondary' rights and duties. In his view, secondary rights and duties arise from violations of primary rights and duties. Austin calls these secondary rights 'remedial' and 'sanctioning'.[23]

It is questionable, however, whether the whole of law really be reduced to duties, commands, and sanctions. Herbert L.A. Hart (1907-1992) has rejected this view. He has pointed out that many rules do not impose duties but rather provide individuals with the possibility to create rights and duties.[24] In his view, any modern legal system consists of a union of both duty-imposing and power-conferring rules.[25] The same distinction has been made by the American jurist Wesley Newcomb Hohfeld (1879-1918).[26] Troubled as he was by the indiscriminate use of the words 'rights' and 'duties',[27] Hohfeld proposed a structure of eight 'correlative' concepts which can be arranged in two groups.[28] Within his theory of fundamental legal conceptions, the distinction between *claims* and *powers* plays a central role.

In its narrowest sense, Hohfeld used the term *right* (or *claim*) as the correlative of the term duty. If someone has a claim, another person is under a duty to behave in a certain way.[29] Consider, for instance, the claim for specific performance and the claim for compensation. From an analytical perspective, such a claim must be distinguished from a *power*, that is the capacity of a person to unilaterally create, modify or extinguish a legal position or relationship, and so to create, modify or extinguish claims and powers.[30] Consider, for instance, the termination of a contract for breach, the rescission of a contract for pre-contractual misrepresentation, and the possibility to extinguish a claim by setoff. The distinction between claims and powers becomes apparent if we take the view of the person affected. Hohfeld demonstrated that this person is not under a duty to behave in a certain way, but is subjected to the liability that the power will be exercised. In his view, therefore, the correlative of a power is not a duty but a liability.[31]

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22 For a contemporary example in the field of private law, see Van Nispen 2018, p. 1-2.

23 Austin 1880, p. 373-374. Kelsen 1945, p. 62-64, has argued that the order should be reversed. If the sanction is an essential element of the law, then the rules which stipulate sanctions must be called 'primary' and the other rules 'secondary'.

24 Hart 1961, p. 26-48.

25 Hart 1961, p. 77-96.

26 See also Hart 1972, p. 800-801. Hart was also inspired by Bentham, who distinguished between coercive laws and permissive laws, and within the latter category between liberties and powers (Bentham 1970, p. 200-201, 290-291).

27 Hohfeld 1913b, p. 28.

28 Lawson 1977, p. 2.

29 Hohfeld 1913b, p. 30-32; Hohfeld 1917, p. 717.

30 Hohfeld 1913b, p. 44-54.

31 As this is 'a well-known legal term with long-settled meanings', Pound 1959, p. 81, has suggested to use the term *risk* instead.

Hohfeld was not the first to distinguish claims and powers. He built on the works of John William Salmond (1862-1924),[32] who adopted the distinction, made by Bernhard Windscheid (1817-1892),[33] between claims and powers.[34] The first concept has been developed by Windscheid himself[35] and still forms the backbone of the German Civil Code, which defines the claim – the *Anspruch* – as 'Das Recht, von einem anderen ein Tun oder Unterlassen zu verlangen (…)'.[36] Under certain conditions, a person may be entitled to demand some performance from another person, such as specific performance,[37] restitution[38] or compensation.[39] The power of an individual to unilaterally create, modify or extinguish a legal position or relationship has been recognised as a separate legal concept ever since the works of Emil Seckel (1864-1924), who used the term *Gestaltungsrecht*.[40] This concept is not as established in other continental jurisdictions, although it is not unusual for a Dutch writer to refer to *wilsrechten*[41] or for a French writer to refer to *droits potestatifs*.[42]

In line with these theories, we will devote our attention not only to claims but also to powers. But we will also incorporate elements of a different character. For the relationship between two persons cannot be fully understood without paying attention to the position of the person affected by the existence of a *claim* or by the exercise of a *power*.[43] Consider the situation that a legal dispute arises and the case is taken to court. It is a well-established rule in all jurisdictions that if a matter is taken to court, it is up to the claimant to allege the elements of the relevant rule of law in order

32 Salmond 1902, p. 217-238.
33 Windscheid 1862, p. 81.
34 See, about the roots of Hohfeld's scheme, Kocourek 1920, p. 25; Pound 1959, p. 76-77; Frydrych 2018, p. 329-331.
35 Windscheid 1856, p. 3-7.
36 § 194 (1) BGB.
37 E.g. § 433 (1) BGB gives the buyer the right to demand from the seller the delivery of possession and ownership of the thing, free from material and legal defects (*Anspruch auf Übergabe und Übereignung einer mangelfreien Kaufsache*). In turn, § 433 (2) BGB gives the seller the right to demand from the buyer payment of the price and acceptance of the delivery of the thing (*Anspruch auf Kaufpreiszahlung und Abnahme der Kaufsache*).
38 E.g. § 985 BGB gives the owner the right to require the possessor to return the thing (*Herausgabeanspruch*).
39 E.g. § 823 (1) BGB gives the person that is intentionally or negligently injured by another party the right to claim compensation from that party for the resulting damage (*Schadensersatz aus unerlaubter Handlung*).
40 Seckel 1903. See about this development Hattenhauer 2011, p. 197 et seq., and about the distinction between *Ansprüche* and *Gestaltungsrechte* Neuner 2012, p. 219-223.
41 Rupke 1914; Drielsma 1940; Drielsma 1946; Meijers 1948, p. 266; Suijling 1948, p. 102-107; Drielsma 1975; Mellema-Kranenburg 1988, p. 8; Snijders 1999; Nieuwenhuis 2007a, p. 52-53; Biemans 2011, p. 193-195; Bartels & Van Mierlo 2013, no. 2; Spierings 2016; Verheul 2017; Van Nispen 2018, p. 52-54, 59-61; Verheul 2018.
42 Najjar 1967, p. 100 et seq.; Bénac-Schmidt 1983, p. 114 et seq.; Pomart-Nomdedeo 2010; Lefer 2016. See also Vaquer 2009, p. 496-497, with references to Italian and Spanish law.
43 See also *supra* section 1.3.

to obtain the result sought.[44] Even though he is not required to mention the rule by its name, it will be up to him to demonstrate – by reference to the relevant standards of proof – that the facts that are necessary for a certain rule to become operative have occurred and that the court must, therefore, conclude that a claim exists or that a power has been lawfully exercised.[45] In turn, the defendant may be able to rely upon a defence. And just as a single set of facts can, on the face of it, give rise to multiple claims or powers, so too may several defences arise in a given case.[46]

Some defences relate to procedural issues such as the competence of the court, the validity of the claim form, or the expiry of the period for appeal. In the present context, we are particularly interested in the defences pertaining to the merits of the case. The defendant may cast doubt on the facts presented by the claimant and argue that one or more elements of the cause of action in which the claimant sues are not present. Alternatively, he may rely upon a justification or an exemption. The defendant may also be able to prevent or limit the actual enforcement of the claim or power, for instance by pleading the defence of limitation of the right of action. The question to consider, is how these defences relate to each other and how they interact with the elements that make up a successful claim or power. We should, therefore, not only consider the rules that may serve as grounds of *claims* and *powers*, but also the rules that can be invoked as *defences*.[47]

It should be admitted at once that this vocabulary does have its limitations. On the one hand, it may be thought of as too specific because it does not cover all the laws in the codes and all the cases in the law reports. Emphasis is laid on claims, powers, and defences, and the remaining rules are seen through this particular lens. On the other hand, the vocabulary may be rejected because it is over inclusive and does not take into account the many fine distinctions existing within the separate categories. Indeed,

44 As noted by e.g. MacCormick 1978, p. 41-52. In most continental legal systems, this rule is enshrined in statutory provisions (e.g. in France in Art. 1353 CC; in the Netherlands in Art. 150 Rv). In Germany, the rule goes by the name of the *Normentheorie* (Rosenberg 1956, p. 153).

45 Unless, of course, the claimant requests a declaratory decision that he is *not* under a legal duty towards the defendant, or that the exercise of a power by the defendant was *not* valid.

46 Already noted by Von Tuhr 1923, p. 18. The defence stage has received more scholarly attention in recent years: Nieuwenhuis 1997, p. 15-16; Bakels 2009a, p. 337; Neuner 2012, p. 242-245; Goudkamp 2013, p. 19-20, 202; Smith 2016.

47 See also *supra* section 1.3.

the categories can be subdivided indefinitely[48] and may even coexist.[49] Finally, the terminology is not widely used in all legal systems that have been examined in the context of this research. In fact, thinking in terms of claims, powers, and defences is only deeply engrained in Germany.[50]

And yet it would be quite a task to make sense of the mass of legal rules if we were to approach the topic without this focus. Using the vocabulary allows for analysis and comparison.[51] It calls our attention to the rules that play a central role in private relationships – claims, powers, defences – whether they are statutory or judge-made, discovered or developed, available only inside the courts or also outside the courts. And when these rules overlap, their relationship must be determined.

2.4 General and specific rules: *lex specialis derogat legi generali*?

Having examined the kinds of rules we are dealing with – claims, powers, defences – we will now consider the situation where they overlap. Such an overlap does not give rise to problems as long as the application of the rules leads to the same outcome. Yet the rules may vary in certain ways, which may lead to different results. The question to consider is whether one legal rule affects the scope of application of another legal rule. In this context, it is often assumed that the specific rule trumps the application of the rule more general in scope. But when is that really the case?

The maxim *lex specialis derogat legi generali* or *specialia generalibus derogant* appeals more to civil lawyers than it does to common lawyers. Common lawyers focus on the facts of each case and on the particular rules established by courts in earlier decisions. They are not principally interested in systematic and abstract reasoning based on general rules of law.[52] By

48 This was recognised already by Hohfeld himself (see Hohfeld 1917, p. 712). As regards claims, for instance, further distinctions can be made between proprietary and obligatory claims (*dingliche und schuldrechtliche Ansprüche*), and still further between primary and secondary obligations (Pothier 1773, p. 80), or between legal and equitable relationships (Hohfeld 1913a, p. 553). Further distinctions can also be made at the defence stage, e.g. between procedural and meritorious defences, and within the latter category between defences pertaining to the existence of a claim (*Einwendungen*) and defences pertaining to its enforcement (*Einreden*), and again within the former category between justificatory and excusatory defences (Neuner 2012, p. 242-245). Consider also the distinction, made by Martín-Casals 2019a, p. 769, between 'absent element defences' and 'affirmative defences'. The first term refers to 'those cases where the claimant fails to establish a basic requirement of liability', the second term to defences that apply 'when all the requirements for liability are established'.

49 Some powers may in substance operate as a defence against the exercise of a claim or power. E.g. the defendant may elect to rescind the contract that forms the basis of the claim.

50 Ebers 2016, p. 53.

51 See also *supra* section 1.3.

52 Zweigert & Kötz 1992, p. 188.

contrast, civil lawyers have grown up with the idea that the answers to legal questions must be deduced from a comprehensive collection of statutory rules.[53] The German Civil Code may serve as an example. Its General Part contains basic rules common to the whole of private law. The four subsequent books provide general rules on obligations, property, family law, and succession. These books have been split up into divisions, titles, subtitles and chapters, each offering a set of rules for various factual situations. Obviously, such a codification is an inexhaustible source of controversy about the proper relationship of general and specific rules.

Thus, it is in the context of codifications that the maxim that specific rules derogate from general rules has attracted considerable attention and appreciation.[54] And it must be admitted that it only seems natural – perhaps even logical – to assume that specific rules have priority over general rules because the former must be considered exceptions to or special applications of the latter. In modern times, however, many writers warn that the application of the maxim is not self-evident. It has been branded as meaningless,[55] misleading,[56] overrated,[57] and utterly unreliable.[58] Indeed, one may wonder just how persuasive the maxim really is.

To begin with, the maxim can really only be relied upon when one rule is general and another rule is specific. It is widely accepted that this is only the case when the *lex specialis* contains all the elements of the *lex generalis* and at least one additional element. In other words: the general rule must embrace all the cases falling within the scope of the specific rule, but the specific rule may not embrace all the cases falling within the scope of the general rule.[59] The relationship between the Articles 6:2 (2) and 6:248 (2) BW may serve as an example. Both provisions state that a binding legal rule does not apply if this would be unacceptable according to standards of reasonableness and fairness. In two respects, Article 6:248 (2) BW is more specific in scope. First, it applies only to the parties to a contract whereas Article 6:2 (2) BW applies to all creditors and debtors. Secondly, it focuses only on the rules binding upon the contracting parties whereas Article 6:2 (2) BW embraces all rules binding upon creditors and debtors by virtue of statute, custom or legal act. Compared to Article 6:2 (2) BW, Article 6:248 (2) BW is clearly the more specific rule.

53 Zimmermann 1995, p. 96-97.
54 See e.g. Kamphuisen 1942; Van Oven 1961.
55 Boukema 1966, p. 35; Kisch 1975, p. 540.
56 Brunner 1984, p. 14-15; Goldie-Genicon 2009, p. 448.
57 Faust 2017.
58 Nieuwenhuis 1982, p. 35.
59 Lent 1912, p. 12; Dietz 1934, p. 22; Kamphuisen 1942, p. 326; Meijers 1948, p. 161; Gassin 1961, p. 91; Boukema 1966, p. 26; Brunner 1984, p. 17-18; Bydlinski 1991, p. 465; Boukema 1992, p. 7-11; Bergel 2001, p. 192; Huber 2001, p. 203-208; Goldie-Genicon 2009, p. 470; Laroche 2014, p. 308; Castermans & Krans 2019, p. 15.

The example underlines the limited value of the maxim. If the rules produce the same outcome, there is really no compelling reason why Article 6:248 (2) BW should automatically trump the application of Article 6:2 (2) BW. Moreover, the overlap can be considered harmless if the *lex specialis* merely complements the *lex generalis*.[60] Thus, it is clear that some conflict must exist in order for one of the rules to make way.[61] But even if a conflict exists, it cannot be taken for granted that the legislature intended the specific rule to trump the general rule. It may have been the intention to improve the position of the aggrieved party.

This implies that the substantive importance of the rules at issue must be considered.[62] Essentially, the question is whether the specific rule demands the subsidiarity of the general rule.[63] According to some writers, the specific rule is subsidiary in nature when its consequences are less advantageous for the claimant than the consequences imposed by the general rule.[64] If a choice would be allowed in these instances, the claimant will always avoid the application of the specific rule, so the argument runs. In practice it will, however, be hard to assess whether the specific rule is really less advantageous. Every rule has its merits and demerits.[65] And even if the specific rule appears to be less advantageous, it is not self-evident that the person concerned wishes to avoid the application of this rule. There may be practical reasons not to rely upon a particular rule, even if a more advantageous possibility is available too.[66]

A more convincing argument for excluding the general rule is that the intentions of the legislature would otherwise be undermined. The question to consider is whether the legislature has really intended a particular rule to be exhaustive.[67] This is a question of interpretation which must be answered on the basis of the wordings, structure, and aims of the rules at issue. Even when the legislature has intended a particular rule to be exhaustive, the other rule should only be excluded to the extent that this is necessary in order to do justice to these intentions, as the *Bundesgerichtshof* emphasises:

> 'Eine abweichende Beurteilung ist zwar geboten, wenn einer Vorschrift zu entnehmen ist, dass sie einen Sachverhalt erschöpfend regeln und dementsprechend die Haftung aus anderen Anspruchsgrundlagen ausschließen oder in bestimmter Hinsicht beschränken will (…).'[68]

60 Boukema 1966, p. 27-28; Boukema 1992, p. 11-12; Goldie-Genicon 2009, p. 471; Castermans & Krans 2019, p. 18.
61 Goldie-Genicon 2009, p. 471.
62 Alexy 2010, p. 49.
63 Dietz 1934.
64 Boukema 1966, p. 28-29.
65 As observed e.g. by Serinet 1996, p. 818; Huber 2001, p. 227; Goldie-Genicon 2009, p. 518.
66 Bussy-Dunaud 1988, p. 277; Leduc 2000, p. 23; Huber 2001, p. 209; Goldie-Genicon 2009, p. 476-477.
67 Castermans & Krans 2019, p. 17-21.
68 BGH 22 July 2014, KZR 27/13, at 53.

The foregoing illustrates that it is far from self-evident that a specific rule trumps the application of a rule more general in scope. Even if the general rule embraces all the cases falling within the scope of the specific rule, which is not always the case, the question as to whether the specific rule sets aside the general rule is a question of interpretation which cannot be answered by relying upon the maxim *lex specialis derogat legi generali*. Rather, we should start from the premise that each rule – whether general or specific in scope – should be realised to the greatest possible extent. The next section will demonstrate that this is, indeed, the approach taken in the legal systems under consideration.

2.5 An alternative scheme of analysis

Does one legal rule affect the scope of application of another legal rule? It appears that legal systems share a scheme of analysis by which this question can be debated and solved. Once a case falls within the substantive scope of multiple rules, the starting point is that each rule must be considered on its own merits and that no rule should be excluded in advance.[69] The *Bundesgerichtshof* in particular has stressed time and again that the conditions, content and enforcement of each claim must be assessed independently:

> 'Sofern eine Handlung die Tatbestände mehrerer anspruchsbegründender Normen erfüllt, treten die daraus resultierenden Ansprüche, soweit sie auf dasselbe Ziel gerichtet sind, grundsätzlich in so genannter echter Anspruchskonkurrenz nebeneinander, mit der Folge, dass jeder Anspruch nach seinen Voraussetzungen, seinem Inhalt und seiner Durchsetzung selbständig zu beurteilen ist und seinen eigenen Regeln folgt (…).'[70]

The underlying principle is that the objectives of each rule should be realised to the greatest possible extent. This basic principle implies that each rule ought to have its intended legal effect, provided, of course, that the necessary elements have been established. French lawyers refer to the principle of *cumul*,[71] German lawyers to *kumulative Konkurrenz*,[72] Dutch lawyers to *cumulatie*[73] and English lawyers to *cumulation* or *combination*.[74]

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69 Edelman 2002, p. 264; Cartwright 2017, p. 11. See also the statement by Lord Herschell in *Derry v. Peek* [1889] 14 App Cas 337 (HL), at 359-360.

70 BGH 22 July 2014, KZR 27/13, at 53. It is settled case law: BGH 16 May 2017, X ZR 120/15, at 13; BGH 19 October 2004, X ZR 142/03, at 7; BGH 11 February 2004, VIII ZR 386/02, at 12; BGH 16 September 1987, VIII ZR 334/86, at 17; BGH 28 April 1953, I ZR 47/52, at 4.

71 Carbonnier 1961, p. 332-333; Bussy-Dunaud 1988, p. 123-128; Goldie-Genicon 2009, p. 155; Tricoire 2009, p. 257-261; Laroche 2014, p. 369.

72 Enneccerus & Nipperdey 1952, p. 217; Larenz 1992, p. 157; Neuner 2012, p. 239-240.

73 Boukema 1966, p. 22; Snijders 1973, p. 454; Brunner 1984, p. 10; Boukema 1992, p. 11-12; Vranken 1998, no. 34; Bakels 2009a, p. 342; Hartkamp 2011, p. 154; Van Nispen 2018, p. 20.

74 Cartwright 1991, p. 141-148; Watterson 2003; Burrows 2004, p. 14-16; Burrows 2016, p. 163; Cartwright 2017, p. 17-18.

Many examples can be given. A contracting party may terminate the contract and also recover the losses resulting from the breach, as is the case under French law.[75] Or he may obtain rescission of the contract and also claim damages in the tort of deceit, as is the case under English law.[76] Under German law, the owner may claim back his object from the possessor, claim any profits made and also claim compensation if the object has been damaged.[77] In all these instances, the claims and powers can be accumulated if the party concerned so wishes. This does not mean that the application of one rule cannot impact upon the application of another rule.[78] The rescission of a contract may, for instance, affect the extent of the recoverable losses.[79] Likewise, an award of damages under one head of liability must be taken into account when assessing the quantum of damages under another head of liability.[80] But these are not sufficient reasons to exclude the application of one of these rules from the outset. To do so would be 'an unnecessarily blunt method of avoiding double recovery', as Burrows has argued.[81]

Sometimes, however, the rules cannot be applied cumulatively, but only alternatively. French lawyers use the term *option*,[82] German lawyers refer to *alternative Konkurrenz*[83] or to *elektive Konkurrenz*,[84] Dutch lawyers to *alternatiiteit*[85] and English lawyers to the *election* between *alternative* remedies.[86] Neuner gives the following explanation:

> 'Mitunter stellt das Gesetz jemandem zwei oder mehrere Ansprüche oder Gestaltungsrechte wahlweise zur Verfügung. (…) Die Rechtsfolgen der wahlweisen Ansprüche oder Gestaltungsrechte schließen sich aus, sie können also nicht nebeneinander verwirklicht werden. Der Berechtigte hat aber zunächst ein Bündel an Rechten.'[87]

There may be several reasons for rules to be alternatives. The legislature may, for instance, have designed the rules to be mutually exclusive.[88] Cumulative application may also lead to inconsistent outcomes. It is logically impos-

75 Art. 1217 CC.
76 *Archer v. Brown* [1985] Q.B. 401 at 415 et seq.; Cartwright 2017, p. 86-88.
77 § 985, § 987 and § 989 BGB.
78 Dietz 1934, p. 334; Boukema 1966, p. 22.
79 Cartwright 1991, p. 143; Cartwright 2017, p. 17.
80 Burrows 1998, p. 43-44.
81 Burrows 1998, p. 41.
82 Popesco-Albota 1933; Martine 1957; Bussy-Dunaud 1988, p. 117-123; Viney 1994; Goldie-Genicon 2009, p. 155; Tricoire 2009, p. 257-261; Abid Mnif 2014; Laroche 2014, p. 14.
83 Enneccerus & Nipperdey 1952, p. 217; Larenz 1992, p. 157.
84 Wiese 2017, p. 233-234.
85 Boukema 1966, p. 22; Snijders 1973, p. 454; Brunner 1984, p. 10; Boukema 1992, p. 12-13; Hartkamp 2011, p. 154; Van Nispen 2018, p. 20-21.
86 Stevens 1996; Watterson 2003.
87 Neuner 2012, p. 240.
88 E.g. section 2 (2) Misrepresentation Act 1967; § 284 and § 437 BGB; Art. 7:21 (1) BW; Art. 1217 CC; Art. 1644 CC.

sible to rescind a voidable contract and also terminate the same contract. Likewise, it is not possible to rescind a contract and also claim damages for breach of contract.[89] After all, rescission means that the contract is retrospectively reversed while termination and damages for breach presuppose the existence of a contractual relationship.[90] Another classic example is the impossible combination of termination for breach and specific performance of the same contract.[91] Similarly, it is not possible to set aside a general term and also nullify the same term.[92] One simply cannot have both.

Can two liability rules ever lead to inconsistent outcomes? Although a double recovery of the losses can – and should – often be prevented by adjusting the quantum of damages, some differences cannot be bridged at this stage. English law does not, for instance, permit the award of both an account of profits and compensatory damages for an intellectual property tort.[93] Nor may damages in contract and tort be combined. The reason is that the rules pull in different directions: damages in contract aim to bring the party in a position as if the contract had been performed (*positive* interest) whereas damages in tort aim to bring the party in a position as if no tort had been committed (*negative* interest).[94] The regimes may also differ with regard to incidental issues such as limitation, jurisdiction, proof, remoteness and the range of available defences.[95] In such situations, the claimant may be required to clarify which rule he wishes to rely upon as his first line of argument.

Sometimes, the law dictates that one of the rules takes priority. French lawyers describe this outcome with the term *non-cumul* or *exclusion*,[96] German lawyers refer to *normverdrängende Konkurrenz*[97] or *Gesetzeskonkurrenz*,[98] Dutch lawyers to *exclusiviteit*[99] and English lawyers to *exclusion*.[100] The principle of *non-cumul des responsabilités contractuelle et délictuelle* is

89 HR 11 October 2013, ECLI:NL:HR:2013:CA3765, *NJ* 2013/492 (*Vano/Foreburghstaete*), at 3.5.2.

90 Cartwright 2017, p. 18.

91 Burrows 1998, p. 41.

92 HR 14 June 2002, ECLI:NL:HR:2002:AE0659, *NJ* 2003/112 (*Bramer/Hofman Beheer*).

93 Burrows 1998, p. 42; Edelman 2002, p. 248. Along similar lines: HR 14 April 2000, ECLI:NL:HR:2000:AA5519, *NJ* 2000/489 (*HBS Trading/Spendax*), at 3.3.5.

94 See generally Van Gerven, Lever & Larouche 2000, p. 33. See also Cartwright 1991, p. 141; Boukema 1992, p. 18; Krans 1999, p. 131-132; Hartkamp 2011, p. 154.

95 For instance, a claim in deceit under English law cannot be met by a defence of contributory negligence, which might apply to a concurrent claim in negligence or under the Misrepresentation Act 1967. See Cartwright 2017, p. 158.

96 Goldie-Genicon 2009, p. 195; Tricoire 2009, p. 317-318.

97 Enneccerus & Nipperdey 1952, p. 217; Larenz 1992, p. 157;

98 Dietz 1934, p. 16. It must be noted that this term has also been used to describe the overlap of multiple rules rather than the exclusivity of one of them, e.g. by Lent 1912, p. 12 et seq.; Enneccerus & Nipperdey 1952, p. 217-218.

99 Boukema 1966, p. 22; Snijders 1973, p. 454; Brunner 1984, p. 10; Boukema 1992, p. 11-12; Bakels 2009a, p. 342; Hartkamp 2011, p. 154; Van Nispen 2018, p. 20; Castermans & Krans 2019, p. 91-114.

100 Burrows 1998, p. 20.

probably the most famous example: it prescribes that the French law of tort is not applicable to losses suffered in the context of a contractual relationship. Although German, Dutch and English courts have not chosen the same solution for this particular problem,[101] they do recognise the possibility of excluding one of the applicable rules. The courts do, however, use the technique with great restraint. The *Bundesgerichtshof* and the *Hoge Raad* focus on the will of the legislature: was the intention really to exclude the application of other available rules?[102] English law focuses on the will of the parties: did they really intend their relationship to be governed exclusively by the contract into which they entered?[103]

Instead of ignoring one of the applicable rules altogether, the courts may also adjust their scopes of application. The *Cour de Cassation*, for instance, declared the short time limit of Article 1648 CC – applicable to claims related to hidden defects of goods – also applicable to the *action en nullité pour erreur*.[104] Likewise, the *Hoge Raad* confirmed that the short time limit of Article 7:23 (2) BW – applicable to the buyer's claims and defences based on the breach of a sales contract – may also apply to claims based on extra-contractual liability, misrepresentation and fraud.[105] The *Bundesgerichtshof* has regularly used this technique too. It has decided, for instance, that the rule that the donor (*Schenker*, § 521 BGB), the lender (*Verleiher*, § 599 BGB) and the board (*Geschäftsführung*, § 680 BGB) can only be held liable in the event of wilful conduct (*Vorsatz*) or gross negligence (*grobe Fahrlässigkeit*) also applies to a tort claim against these people.[106] A similar approach has essentially been adopted by the Court of Appeal of England and Wales when it decided that the 'reasonable contemplation' test in contract also applies to a concurrent claim in negligence for pure economic loss,[107] and by the Supreme Court of the United Kingdom when it decided that the existence of a contract determines the scope of a concurrent equitable custodial duty.[108]

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101 This will be further explained in Chapter 3 of this book.

102 BGH 17 March 1987, VI ZR 282/85, at 37-38; BGH 12 December 1991, I ZR 212/89, at 10; BGH 22 July 2014, KZR 27/13, at 53; and HR 28 June 1957, *NJ* 1957/514, note L.E.H. Rutten (*Erba/Amsterdamsche Bank*); HR 15 November 2002, ECLI:NL:HR:2002:AE8194, *NJ* 2003/48, note J.B.M. Vranken (*A.V.O./Petri*), at 3.7.2; HR 15 June 2007, ECLI:NL:HR:2007:BA1414, *NJ* 2007/621, note K.F. Haak (*Fernhout/Essent*), at 4.2.

103 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL).

104 Cass. 1e Civ. 19 July 1960, *Bull. civ.*, I. no. 408; *RTD civ.* 1961. 332, note J. Carbonnier; Cass. 3e Civ. 11 February 1981, *Bull. civ.*, III, no. 31; *D.* 1981. IR. 440, note Ch. Larroumet. The *Cour de Cassation* later changed its position, see Goldie-Genicon 2009, p. 165-171.

105 HR 21 April 2006, ECLI:NL:HR:2006:AW2582, *NJ* 2006/272 (*Inno/Sluis*); HR 29 June 2007, ECLI:NL:HR:2007:AZ7617, *NJ* 2008/606, note J. Hijma (*Pouw/Visser*); HR 23 November 2007, ECLI:NL:HR:2007:BB3733, NJ 2008/552-553, note H.J. Snijders (*Ploum/Smeets*); HR 17 November 2017, ECLI:NL:HR:2017:2902, *NJ* 2017/438 (*MBS Raad*).

106 BGH 23 March 1966, BGHZ 46, 140; BGH 30 November 1972, NJW 1972, 475; BGH 20 November 1984, BGHZ 93, 23.

107 *Wellesley Partners LLP v. Withers LLP* [2015] EWCACiv 1146.

108 *AIB Group (UK) v. Mark Redler & Co Solicitors*, [2015] AC 1503 (UKSC), analysed in more detail by Taylor 2019, p. 36-41.

The resulting rule contains elements of both bodies of law but is quite different from its components. Writers have coined new terms to describe this effect, such as *contorts*,[109] *mixed* claims,[110] and *Anspruchsnormenkonkurrenz*.[111] Writers with a preference for all things dogmatic, however, argue that the resulting hybrids do not fit the existing categories of the law. Goldie-Genicon, for instance, strongly disapproves of the fusion of general and specific rules of contract:

> 'La mise en œuvre d'une telle technique a un effet radical : elle retire tout enjeu au concours d'actions. Le plaideur n'aura plus aucun intérêt à agir sur le terrain du droit commun. L'option entre les deux actions est maintenue, mais elle est illusoire. (…) Par une sorte de mariage contre nature, elle crée une action nouvelle qui emprunte aux deux corps de règles, et méconnait les contours de chaque action définis par le législateur.'[112]

It is clear that the 'fusion' of two bodies of law provokes strong reactions. Yet the approach has much to recommend it. Rather than defying the will of the legislature or acting contrary to precedent, the courts try to do justice to the objectives underlying each rule. They reduce the restrictions imposed by the prioritised rule to a minimum and retain as much of the other rule as possible. This may be particularly useful when the prioritised rule shows gaps and, hence, does not provide all the answers. As a result, the claimant may still benefit from the application of the rule of his choice. Contrary to what Goldie-Genicon contends, this choice has not become illusory: the claim is not declared inadmissible and the arguments have not been put forward without reason. At the same time, the defences invoked by the defendant are taken into account, even when they belong to a different legal regime.

The examples illustrate that the courts consider a total rejection of concurrence an unnecessarily blunt instrument. They strive to realise every applicable rule to the greatest possible extent. Consequently, the existence of alternative and exclusive rules is an exception which requires justification. It flows from this reasoning that the party concerned – usually the claimant – may rely on the most advantageous rule – usually a specific cause of action – unless the rules are incompatible or one of them applies exclusively. We have seen that the benefit of this choice may nonetheless be affected, because the content of one rule might affect the content of another rule.[113] This does not mean that the rules are identical in all respects, nor that one of the rules is swallowed up by the other. The rules continue to exist side by side, in accordance with the basic principle that each rule ought to have its intended effect.

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109 Gilmore 1974, p. 88, 90 and 94.
110 Snijders 1973; Nieuwenhuis 1982.
111 Georgiades 1968.
112 Goldie-Genicon 2009, p. 165.
113 Also observed by Taylor 2019, p. 21 and 45.

2.6 Conclusion

The purpose of this chapter was to uncover the principles that must be taken into account when solving issues of concurrence in private law. Before examining this question, we have first taken a step back and analysed in more detail the kinds of rules which play a central role when adjudicating disputes between individuals in modern systems of private law. Drawing on insights from analytical jurisprudence and general theories of law, this chapter has distinguished three categories of rules. We have examined the claims which entitle the individual to demand some performance from another individual, such as the claim for specific performance and the claim for compensation. Secondly, we have focused on the powers by which an individual may unilaterally create, modify or extinguish a legal position or relationship, such as the power to terminate a contract. Thirdly, we have adopted the perspective of the person affected and examined the defences by which the enforcement of such claims and powers can be prevented.

These claims, powers, and defences have been built up over the years, sometimes even without any serious consideration by legislatures or courts of adjacent rules and accompanying principles. And even when attempts have been made to build a coherent system, notably in codified systems of private law, the rules may still overlap. Such an overlap does not give rise to problems as long as the application of the rules leads to the same outcome. Yet the rules may vary in important ways, which may lead to different results. In such situations, the question is raised whether one rule affects the scope of application of another rule. This question arises regularly, both on the part of the claimant and on the part of the defendant. The problem of concurrence may be unwelcome, but it is clearly ineradicable.

The question is how we should solve it. One response is to assume that specific rules have precedence over rules more general in scope. This chapter has submitted that it is appropriate to adopt a cautious approach in this respect and to avoid jumping to this conclusion. To begin with, the maxim *lex specialis derogat legi generali* can really only be relied upon when one rule is general and another rule is specific. It is widely accepted that this is only the case when the general rule embraces all the cases falling within the scope of the specific rule. But even if that is the case, the question as to whether the specific rule trumps the general rule is a question of interpretation which cannot be answered by assuming that the specific rule will have priority. Rather, this chapter has argued that we should start from the premise that each rule – whether general or specific in scope – should be realised to the greatest possible extent.

The chapter has shown that this is, indeed, the approach taken in the legal systems under consideration. They share a number of basic responses when dealing with the availability of claims, powers, and defences in relationships between individuals. Together they provide a scheme of analysis by which issues of concurrence can be debated and solved. The starting point is that each applicable rule, however founded, should be realised to

the greatest possible extent. In principle, then, each rule ought to have its intended legal effect once the necessary conditions have been established. It flows from this reasoning that the claimant or defendant should have a free choice to invoke the rule that appears to him to be the most advantageous. An exception must be made, however, if cumulative application would lead to inconsistent outcomes which cannot exist concurrently. In such situations, an election between the available alternatives is required. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. For the same reason, the law sometimes prescribes that one of the rules applies exclusively, so that no election can be made at all.

Every case may spark a debate about whether the rules are incompatible or whether one of them applies exclusively. The outcome may differ depending on the content of the rules at issue. The next chapter illustrates this point by discussing a classic example of concurrence: the overlap of the laws of contract and tort. In doing so, the chapter considers in greater detail the reasons underlying the decision to permit or restrict the availability of claims, powers, and defences.

3 Concurrent Claims in Contract and Tort: A Comparative Perspective*

3.1 Introduction

The previous chapter examined the principles that must be taken into account when solving issues of concurrence in private law. The chapter showed that lawyers from different jurisdictions use the same arguments when debating and solving issues of concurrence in private law. In principle, they strive to realise the objectives of each rule to the greatest possible extent. This means that concurrence is generally allowed, freedom of choice is the natural consequence and the existence of alternative or exclusive rules is an exception which requires justification.

If the same principles are being followed, does this mean that similar issues are solved in similar ways too? This question is examined in the present chapter. The attention is fixed on the problem that has always been at the heart of the debate: the overlap of the laws of contract and tort. More particularly, the chapter analyses whether, and to what extent, the law permits a choice between finding liability in contract and in tort. The chapter examines the approaches in several European jurisdictions, analyses their historical development and explains their differences by looking at the underlying structure of these systems of private law. In doing so, the chapter considers in greater detail the reasons underlying the decision to permit or restrict the availability of claims, powers, and defences.

Comparative studies on this topic do exist, but they are either not written in English,[1] are somewhat outdated,[2] or they provide a comprehensive assessment of the law as it stands rather than an explanation of its development.[3] It is the aim of this chapter to add a current comparative account to these sources. This also offers the opportunity to discuss recent developments in case law and legislation. For present purposes, French, German and English law have been selected. These are the most important private law systems in contemporary Europe, and they represent both the civil and the common law traditions. Reference is also made to Dutch law, given that this system has been influenced by the French Code Civil but has adopted a solution that is comparable to the approach under German law.

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1 Schlechtriem 1972; Von Amsberg 1994; Kegel 2002; De Graaff & Moron-Puech 2017.

2 Weir 1984; Van Rossum 1995.

3 Von Bar & Drobnig 2004, p. 26-315; Martín-Casals 2019b.

It is necessary to clarify three terminological issues from the outset. First of all, this chapter only deals with the laws of contract and tort and not with the remaining extra-contractual obligations.[4] Secondly, and in line with the general scope of the present book,[5] this chapter focuses on private parties and not on public bodies. The liability of public bodies is either a matter of administrative law or governed by private law but influenced by administrative rules and principles.[6] Thirdly, this chapter uses the common law term 'tort' instead of the civil equivalent 'delict'.[7]

In order to fully understand the nature and scope of the problem, the chapter first shows the areas of overlap (section 3.2) and the distinctions (section 3.3) between the laws of contract and tort. The chapter then examines the approaches in several European jurisdictions and traces their historical development. French law is straightforward: finding liability in tort is not possible if the damage is caused by or related to the performance, or non-performance, of a contractual obligation (section 3.4). German, Dutch and English law take the opposite point of view: finding liability in tort is not precluded if the damage is caused by or related to the performance, or non-performance, of a contractual obligation (sections 3.5-3.6). The analysis shows that these legal systems have developed these particular approaches in the light of their own legal history and under the influence of the scope and structure of their own laws of contract and tort. The analysis also shows that both solutions are more nuanced than they seem at first sight and that a trend towards convergence can be observed in all jurisdictions (section 3.7).

3.2 Concurrence of the laws of contract and tort

On the face of it, an act or omission may not only constitute a breach of contract but may also violate a tortious duty. Incorrect performance of the contract may, for instance, cause injuries to body or health or may inflict property damage. Typically, these interests are also protected by the law of tort.[8] Whether the facts of a case actually fall within the laws of contract and tort, depends on the scope of both branches of the law in a particular legal system.[9]

4 E.g. the law of unjustified enrichment, including undue payment (*condictio indebiti*), and the law governing the benevolent intervention in another's affairs (*negotiorum gestio*).
5 See *supra* section 1.5.
6 Oliphant 2016.
7 Zimmermann 1996, p. 907.
8 This does not imply that the type of loss is decisive as regards the question whether liability in tort can be established (in some jurisdictions it is not decisive, e.g. in France and the Netherlands).
9 Taylor 2019, p. 21.

Liability for breach of contract can only be established when one of the parties has failed to comply with the express or implied terms of the contract.[10] It is therefore necessary that a valid contract exists. This depends, first of all, on the definition of contract. Some agreements do not fall within the law of contract in a particular jurisdiction. It also depends on the rules that govern the formation[11] and form of the contract[12] and on the presence of vitiating factors that may make the apparent contract void *ab initio* (e.g. mistake or grounds of illegality) or with retroactive effect (e.g. rescission for misrepresentation). Furthermore, the parties have to be bound by the contract, which depends on the rules of agency and the rights of third parties.[13] A valid contract only creates rights and obligations for those parties during the period that the contract is in force. As a consequence, liability for breach of contract does not, typically, come into play if the facts took place before the parties concluded the contract or after the contract has ended, or has been avoided or terminated.[14]

In order for tortious liability to arise, the act or omission must have been unlawful, which depends on the scope of the law of tort in a particular jurisdiction. Common law jurisdictions rely on individual torts that have mainly been developed in case law. In English law, for example, there are numerous torts and equitable wrongs. Some have a broad field of application (negligence), but most are limited to particular situations (e.g. assault, battery, trespass to goods, inducing breach of contract, conspiracy, intimidation). Civil jurisdictions have codified their private law systems. In some of these systems, the law of tort is based on broad, general provisions. In France, for instance, every person who is at fault and thus causes harm to another person must compensate for any losses sustained.[15] In Germany and the Netherlands, tortious 'fault' liability may only arise when certain interests have been harmed or when certain norms have been violated. Liability may arise when a legally acknowledged right has been infringed, when a

10 The subject can be approached even more extensively, by including those situations in which the parties are in a special relationship 'equivalent to contract' (as is done by Deakin, Johnston & Markesinis 2013, p. 20-24). However, the laws of contract and tort do not overlap here, so there is no choice available at all.

11 Offer and acceptance (cf. Art. 6:217 BW) may not be enough. English law requires consideration in order for an agreement to constitute a contract. Until 2016, French law required a 'cause' (Art. 1108 CC). This requirement has been abolished in Art. 1128 CC, as a result of *Ordonnance n° 2016-13*.

12 In all legal systems, there are specific formalities for certain types of contract, such as the requirement that contracts for the sale of land have to be in writing.

13 A contract may confer rights on third parties which are enforceable directly by the third parties themselves. See e.g. the Contracts (Rights of Third Parties) Act 1999; Art. 6:253 BW.

14 Beale and others 2010, p. 105-106. European legal systems tend to establish precontractual liability on the basis of the law of tort or on the basis of a special regime of precontractual liability (*culpa in contrahendo*, e.g. § 311, paras 2 and 3 BGB), see Cartwright & Hesselink 2008, p. 457-460; Martín-Casals 2019a, p. 716-719 and 793-802.

15 Formerly Art. 1382 and 1383 CC, currently Art. 1240 and 1241 CC.

statutory duty has been breached,[16] or following a violation of either public morals with the intention to inflict damages[17] or, of a rule of unwritten law pertaining to proper social conduct.[18]

Similar lines can be recognised when it comes to the activities or capacities to which the law attributes a so-called 'strict' tortious liability. Liability may then be established without proving 'fault' on the part of the defendant,[19] although it may be possible for the defendant to escape liability, for instance, by proving that he has exercised reasonable care. French law maintains several strict liability regimes, including a general liability for damage caused by a *chose* (an object or thing)[20] and a general liability for damage caused by a person that is under the tortfeasor's supervision.[21] Both liabilities were established by the *Cour de Cassation* on the basis of Article 1384, paragraph 1 CC, and have recently been codified by the legislature in Article 1242 CC. In other legal systems, strict liability only exists on the basis of specific rules more limited in scope.[22]

The law generally offers the aggrieved party several rights (or remedies).[23] If the necessary conditions are fulfilled, the law of contract entitles him to claim damages, to demand specific performance, and to terminate the contract.[24] The victim of a tort may also be entitled to claim damages to compensate for the harm suffered.[25] When it comes to the relationship between the laws of contract and tort, one question has therefore been at the heart of the debate: does the law permit one contracting party to claim damages in tort from the other contracting party?[26] The answer to this question matters. As the next section shows, the outcome of the case may not always be the same depending on whether the claim is based on one branch of the law or the other.

16 § 823 BGB; Art. 6:162 (2) BW.
17 § 826 BGB.
18 Art. 6:162 (2) BW.
19 In English law, 'fault' assumes three forms: malice, intention (including recklessness), and negligence (Deakin, Johnston & Markesinis 2013, p. 27).
20 Cass. Civ. 16 June 1896, S. 1897. I. 17, note Esmein (*Teffaine*).
21 Cass. ass. plén. 29 March 1991, D. 1991. 324, comm. Larroumet, JCP 1991. II. 21673 (*Blieck*).
22 English law knows several specific torts that do not require proof of malice, intention, recklessness or negligence (e.g. breach of statutory duty, trespass to land, defamation, vicarious liability, liability for animals). German law knows specific strict liability rules (§ 833 BGB and several acts outside the BGB). The same goes for the Netherlands (cf. Art. 6:169-184 BW, on liability for persons and things).
23 Traditionally, English lawyers see rights through the lens of the remedies by which they are given effect. See *supra* section 1.3.
24 The range of rights (or remedies) also depends on the nature of the contract. Their order may differ from one legal system to another.
25 Van Gerven, Lever & Larouche 2000, p. 740-741 and 868-871. § 249 (1) BGB prescribes restitution in kind as the first and foremost remedy, Art. 6:103 BW prescribes restitution in money, but allows the victim to claim, and the court to order, restitution in kind.
26 Von Bar & Drobnig 2004, p. 6.

3.3 The differences between the laws of contract and tort

The overlap between the laws of contract and tort does not give rise to problems as long as application of the rules produces the same outcome.[27] However, the laws of contract and tort vary in certain ways, which may lead to different results depending on the basis of the claim for damages. On a fundamental level, this may be caused by the different aims of the laws of contract and tort. Generally speaking, the law of tort protects persons and their property, while the law of contract promotes their development.[28] In practice, the most important differences relate to the establishment and scope of liability, to questions of limitation or prescription and to questions of jurisdiction.[29]

The first category concerns the conditions that are required to *establish* liability. For the outcome of the case, the following are determining factors: the elements which, when taken together, make a successful claim; the tests which have to be applied to fulfil those conditions; who is under the obligation to furnish the relevant facts; and who bears the burden of proof. These rules may differ. For instance, a strict liability regime does not, typically, require the claimant to argue (and if contested, prove) fault on the part of the defendant. It is up to the defendant to argue (and if contested, prove) the absence of fault, provided that the law allows such a defence.

Secondly, the *scope* of liability may differ. This question concerns the type and extent of the losses that may be recovered under the respective heads of liability.[30] The laws of contract and tort may vary with regard to the type of loss that may be claimed[31] and with regard to the possibility to demand exemplary or punitive damages.[32] The scope of liability is also determined by the remoteness of the damage. To determine whether or not the damage is too remote, most legal systems refer to factors such as

27 See also Martín-Casals 2019a, p. 714.

28 Weir 1984, p. 5. See also Borghetti 2019, p. 134-135 and 152-153; Keirse 2019, p. 333-335; Magnus 2019, p. 174 and 188-189; Martín-Casals 2019a, p. 714-715.

29 Cf. Weir 1984, p. 7-24; Kegel 2002, p. 119 et seq.; Martín-Casals 2019a, p. 723-780.

30 Some legal systems deal with this question when establishing liability (e.g. English and French law), while other legal systems deal with this question after liability has been established (e.g. German and Dutch law). See Van Gerven, Lever & Larouche 2000, p. 395-427.

31 E.g. pure economic loss, consequential economic loss and non-economic loss. Dutch and French law are not familiar with a separate category of pure economic loss. German law generally excludes pure economic loss from the scope of the law of tort, while English law typically allows recovery of pure economic loss under the 'economic' torts, but shows restraint when it comes to the tort of negligence. For an overview of the rules and exceptions, see Van Boom 2004, p. 1-40.

32 Exemplary or punitive damages are generally only available in tort, in as much as they are available at all. They are typically not available in contract, unless contracting parties include in their contract a clause providing for the payment of an agreed sum for non-performance of a contractual obligation. See generally Von Bar & Drobnig 2004, p. 110; Martín-Casals 2019a, p. 739.

the underlying duty, the nature and foreseeability of the damage[33] and the nature of the defendant's act.[34] The underlying duty is also important for the assessment of a defence of contributory negligence[35] and for the applicability of contractual or statutory rules that limit or reduce the scope of recoverable damages. Finally, the calculation of damages proceeds on different bases: damages for breach of contract aim to bring the claimant in a position as if the contract had been performed (*positive* interest), whereas damages for tort aim to bring the claimant in a position as if no tort had been committed (*negative* interest).[36]

A third issue relates to the *limitation* of the action or the *prescription* of the claim.[37] Due to differences in the commencement and the duration of the applicable time limits, one claim may already be barred by limitation or prescription while the other claim may still be enforceable. Even when a general regime has been created for all claims for damages, specific rules may exist for certain liabilities.[38]

Finally, the liability rules may lead to different competent courts. This issue does not only present challenges if the facts of the case are linked to different jurisdictions, as challenges may also arise within the confines of one jurisdiction. The legislature may have designated special courts to adjudicate on claims with a certain value, such as county courts or sub-district courts, or on claims of a certain type, such as labour courts or maritime law courts. The claimant may or may not prefer to bring proceedings before a special court, for instance, because legal representation is or is not mandatory. The nature of the claim may also determine whether the claimant is permitted to take the matter to another court than the court of the defendant's domicile and whether legal aid is available.[39]

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33 E.g. Art. 1231 (3) CC (formerly Art. 1150 CC) limits recovery in contract to foreseeable damage.

34 See e.g. Art. 6:98 BW; Cartwright 1996.

35 In some cases, contributory negligence cannot reduce damages, e.g. when the claim is for strict liability for accidents caused by motor vehicles (Art. 3, *Loi n° 85-677 du 5 juillet 1985 tendant a l'amelioration de la situation des victimes d'accidents de la circulation et a l'acceleration des procedures d'indemnisation*, hereafter *Loi Badinter*) or for the breach of a strict contractual duty (cf. Burrows 2011, p. 368).

36 See generally Van Gerven, Lever & Larouche 2000, p. 33. See also Cartwright 1991, p. 141; Boukema 1992, p. 18; Krans 1999, p. 131-132; Hartkamp 2011, p. 154.

37 Unlike prescription, limitation does not extinguish the right, but only makes it impossible to enforce it.

38 E.g. French, German and Dutch law provide one regime that governs all claims for damages (Art. 2224 CC; § 195 BGB; Art. 3:310 BW). At the same time, there are special time limits, e.g. for certain contractual claims (e.g. Art. 114-1 *Code des assurances*; § 438 BGB; Art. 7:23 (2) BW).

39 *Joyce v. Sengupta* [1992] EWCA Civ 9 provides an example, although the case concerned concurrent claims in tort. The plaintiff sued only on the basis of the tort of injurious falsehood and not on the basis of defamation, because legal aid was not available for defamation.

The differences outlined above may or may not arise. As will become apparent, in some respects, some legal systems have successfully converged their liability rules. Yet it is safe to say that in all jurisdictions, the outcome of a case will not always be the same depending on whether the claim is based on the breach of a contractual obligation or on the violation of a tortious duty. For the aggrieved party, it may therefore be more favourable to sue in either contract or tort. This raises the question whether, and to what extent, the law permits such a choice. The following sections examine how this question is answered in terms of French, German, Dutch and English law.

3.4 French law: the gradual emergence of the *non-cumul* principle

The relationship between the laws of contract and tort has generated considerable interest in French literature.[40] At the end of the 19th century, the debate was triggered by the scholars Sainctelette and Grandmoulin. Sainctelette argued that voluntary obligations, created by a contract, should be clearly distinguished from obligations imposed by the law.[41] By contrast, Grandmoulin argued that no separate regime of contractual liability existed, as this liability was part of a unified 'théorie de la responsabilité'.[42]

Eventually, most scholars adopted an intermediate position, according to which contractual and tortious liabilities were part of the general law of obligations, but should be treated differently.[43] As Brun stated in 1931: 'il n'y a pas deux responsabilités, mais deux régimes de responsabilité'.[44] By then, most writers supported the idea that the parties to a contract should only be subject to the law of contract in order to respect the freedom of contract and the intention of the legislature. It should not be accepted that parties, having concluded a contract, could 'escape' into the general regime of tort.[45]

This solution became known as the principle of *non-cumul des responsabilités contractuelle et délictuelle* (hereinafter: *non-cumul*). The terminology is somewhat misleading, because it suggests that the only purpose of the rule is to make sure that the aggrieved party is not compensated twice. This is surely stating the obvious. It is neither the intention of the aggrieved party, nor the meaning of the rule. Rather, the rule means that recourse to the law of tort is excluded. If the harm occurs in the context of a contractual relationship, the aggrieved party cannot claim in tort.[46]

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40 See, on the origins of the distinction between contract and tort in French law, Moron-Puech 2018, who submits that the distinction was not imposed by the *Code Civil* of 1804 and was not expressly recognised by the courts until the 1890s.

41 Sainctelette 1884, p. 15. The same idea was developed by Sauzet 1883, p. 596-640.

42 Grandmoulin 1892, p. 88. The same idea was developed by Lefebvre 1886, p. 494: 'Toute faute est *delictuelle*. La faute *contractuelle* n'existe pas.'

43 See for an overview Juen 2016, p. 12-17, and Viney 1995, p. 399.

44 Brun 1931, p. 382.

45 Borghetti 2010, p. 23-24, with further references.

46 Moréteau 2013, p. 765.

Three judgments are usually cited to show that the *Cour de Cassation* had already accepted the principle of *non-cumul* in the year 1890,[47] reiterated this in the year 1922[48] and firmly established this by the year 1927.[49] Nevertheless, according to several authors, these judgments did not create a convincing precedent at the time.[50] After all, the *Cour de Cassation* only stated that the conditions for contractual and tortious liability are not the same[51] and that damages for the violation of a contractual norm have to be awarded on the basis of the law of contract.[52] Recourse to the law of tort is not excluded as a matter of principle.[53]

Upon closer examination, it appears that the courts have developed the principle of *non-cumul* much more gradually. In fact, French courts, including the *Cour de Cassation*, continued to allow recourse to the law of tort in several proceedings between contracting parties also after the judgments of 1890, 1922 and 1927.[54] It lasted until 1945 before the *Cour de Cassation* clearly expressed that a contracting party might not benefit from the exercise of a tort claim if he could also bring a contractual claim.[55] Several authors

47 Cass. req. 21 January 1890, D. 1891. 1. 380. Brun 2009, p. 68, refers to this judgment and states that the principle of *non-cumul* 'a été pose dès la fin du XIXe siècle par la jurisprudence'.

48 Cass. Civ. 22 January 1922, D. 1922. 1. 16; S. 1924. 1. 105, note Demogue. Van Gerven, Lever & Larouche 2000, p. 41 (fn. 93), identify this judgment as the 'leading case'; Whittaker 1995, p. 334, refers to the same judgment and notes: 'By the 1920s, the rule of *non-cumul* had become accepted by the majority of both courts and writers'.

49 Cass. Civ. 6 April 1927, D. 1927. 1. 201, note H. Mazeaud. Babert 2002, p. 268 refers to this judgment and states: 'C'est donc bien en 1927 que la Cour de Cassation change sa jurisprudence.'

50 Viney 1994, p. 817; Babert 2002, p. 265-266; Borghetti 2010, p. 14-29; Abid Mnif 2014, p. 74-78; Capitant, Terré & Lequette 2015, p. 265, no 4. See already Popesco-Albota 1933, p. 172; Savatier 1951, no. 149; Martine 1957, p. 16 et seq.

51 Answering the question whether every fault, however simple, should lead to the obligation to make good the damage, Cass. Civ. 22 January 1922, D. 1922. 1. 16; S. 1924. 1. 105, note Demogue, responds that this is not the basic rule under the regime of contractual liability: 'c'est seulement en matière de délit ou quasi-délit que toute faute quelconque oblige son auteur à réparer le dommage provenant de son fait'. The same reasoning can be found in Cass. req. 21 January 1890, D. 1891. 1. 380 and in Cass. Civ. 6 April 1927, D. 1927. 1. 201, note H. Mazeaud.

52 Cass. Civ. 22 January 1922, D. 1922. 1. 16; S. 1924. 1. 105, note Demogue, states that the rules governing extra-contractual liability are not applicable to a claim based on a breach of contract. Such a claim is governed by the law of contract: 'les articles 1382 et suivants sont sans application lorsqu'il s'agit d'une faute commise dans l'exécution d'une obligation résultant d'un contrat'. The same reasoning can be found in Cass. Civ. 6 April 1927, D. 1927. 1. 201, note H. Mazeaud.

53 Borghetti 2010, p. 16-17; Abid Mnif 2014, p. 74-75.

54 In Cass. Req. 14 December 1926, D. 1927. 1. 105, note Josserand, the *Cour de Cassation* held that the conduct of the responsible persons working at a psychiatric clinic constituted 'en même temps que l'inexécution de leur obligation contractuelle surveillance, une faute délictuelle' towards the patient concerned. An overview of the case law can be found in Borghetti 2010, p. 17-21, and in Abid Mnif 2014, p. 76-77.

55 Cass. Civ. 6 March 1945, D. 1945. 1. 217: 'la victime d'un dommage [provenant de l'inexécution d'un contrat ou de sa mauvaise exécution], qui peut exercer l'action contractuelle, ne saurait préférer l'exercice de l'action délictuelle'.

therefore argue that the principle was only truly established by the 1950s.[56] The *Cour de Cassation* has since reaffirmed this position several times,[57] and has also begun to refer to the principle of *non-cumul* in its judgments.[58]

Apart from the influence exerted by the literature, there are other reasons that seem to have motivated the courts to finally embrace the principle of *non-cumul*. One important reason was the significant expansion of the general strict liability for damages caused by a *chose* (an object or thing) under Article 1384, paragraph 1 CC. In the judgment *Jand'heur* (1930), the *Cour de Cassation* decided that: (1) the presumption of liability under Article 1384, paragraph 1 CC could only be rebutted by proving that the damage had been caused by chance, by *force majeure* or by an external cause that could not be imputed to the defendant; that (2) in order to escape liability, it did not suffice that the defendant had not been negligent or that the cause of the damage remained unknown; and (3) that in order to establish this liability, it was not relevant whether the defendant wielded the object, nor was it necessary to prove that the object was, by its nature, defective and thus likely to cause damage.[59]

By its ruling in *Jand'heur*, the *Cour de Cassation* effectively created the possibility to hold any *gardien* of any object liable for the damage caused by that object, even if the defendant successfully proved that he was not at fault. Needless to say that, without any restriction, an extra-contractual regime with such generality would be able to intrude and possibly distort the rules governing the liability of parties to a contract. A contracting party would have a claim each and every time his property was damaged by an object that was controlled by the other contracting party. Although scholars quarrel about the exact causal relationship, the expansion of this strict liability regime has clearly been an important reason for the courts to further strengthen the principle of *non-cumul*.[60]

This impression was confirmed by yet another significant turnaround in the case law of the *Cour de Cassation*. In the judgment *Mercier* (1936), the *Cour de Cassation* clarified that the relationship between medical prac-

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56 Viney 1994, p. 817; Martine 1957, p. 16 et seq.; Abid Mnif 2014, p. 78. Brun 2010, p. 491, also admits that the principle of *non-cumul* 'ne s'est pas imposée d'emblée et définitivement sans quelques soubresauts, quelques hésitations et peut-être même sans quelques mouvements contradictoires'.

57 Brun 2009, p. 68, referring e.g. to Cass. 1e Civ. 4 November 1992, *Bull. civ.* I, no. 276: 'le créancier d'une obligation contractuelle ne peut se prévaloir contre le débiteur de cette obligation, quand bien même il y aurait intérêt, des règles de la responsabilité délictuelle'.

58 The *Cour de Cassation* refers to 'la règle du non-cumul des responsabilités contractuelle et délictuelle' (Cass. 2e Civ. 3 March 1993, no 91-17.677) and to 'le principe de non-cumul des responsabilités contractuelle et délictuelle' (Cass. 1e Civ. 28 June 2012, no 10-28492).

59 Cass. ch. réun. 13 February 1930, D. 1930. 1. 57, S. 1930. 1. 121, note Esmein (*Jand'heur*).

60 Borghetti 2010, p. 25-29, argues that this has been the main reason for the courts to finally establish the principle of *non-cumul*. Brun 2010, p. 491, argues that the principle was already established in 1890, but admits that 'l'avènement du principe de responsabilité du fait des choses ait pu conduire la jurisprudence à affermir sa position sur l'interdiction de l'option'.

titioners and their patients was contractual and not extra-contractual.[61] The driving force behind this decision was likely to have been the need to shield medical practitioners from liability under Article 1384, paragraph 1 CC.[62] Given the principle of *non-cumul*, this qualification brought these relationships exclusively within the realms of the law of contract. According to Whittaker, it clearly dawned on the courts that 'by manipulating the boundaries of contract, they can manipulate the boundaries of delict'.[63]

One may wonder, however, why the courts did not 'manipulate' those boundaries directly, by adjusting the interpretation of Article 1384, paragraph 1 CC, to take into account the special nature of the relationship between doctors and their patients. The courts may have taken the view that this general provision was not that easy to adjust, that the interpretation given in *Jand'heur* should not be revised so soon or that the solution in *Mercier* was in fact a good compromise. A similar question comes to mind concerning the solution of *non-cumul* itself. Instead of excluding the application of the law of tort altogether, why did the courts not adjust the tort claim to the rules and terms governing the contract? The courts may have been influenced by the then prevailing doctrinal opinion,[64] according to which, the regimes of contract and tort were fundamentally distinct and could not be mixed.[65]

As dogmatically sound as the principle of *non-cumul* may be, it does treat contracting parties differently from and possibly less favourably than parties that are not in a contractual relationship. This implication has not only been criticised by scholars[66] but has also been mitigated to some extent by the courts and the legislature. The courts have, for instance, used and expanded the concept of *obligations de sécurité*, obligations owed by one contracting party to look after the personal safety of the other contracting party. This concept was established by the *Cour de Cassation* for the first time in 1911,[67] on the basis of Article 1135 CC, currently Article 1194 CC. According to this provision, agreements impose obligations on parties not merely in respect of that which they have expressly agreed upon, but also in respect of that which follows from 'l'équité, l'usage ou la loi'. This provision has given the courts the necessary leeway to protect contracting parties while taking into account the nature of their relationship.[68] Some contracts create *obligations de moyens*, under which parties have to take reasonable

61 Cass. Civ. 20 May 1936, D. 1936. 1. 88, note E.P.; S. 1937. 1. 321, note Breton (*Mercier*).
62 Borghetti 2010, p. 26-28. Some patients also benefited from this outcome, because the claim became subject to a more favourable regime of prescription. See Bellissent 2001, no. 956.
63 Whittaker 1995, p. 336.
64 According to Abid Mnif 2014, p. 79.
65 See e.g. Bonnet 1912, p. 437; Brun 1931, no. 351.
66 E.g. by Esmein 1956.
67 Cass. Civ. 21 November 1911, D. 1913. 1. 249, note Sarrut, S. 1912. 1. 73, note Lyon-Caen (*Compagnie générale transatlantique*).
68 Viney 1995, p. 652; Whittaker 1995, p. 336; Borghetti 2016, no. 34.

care, while other contracts are a source of *obligations de résultat*, where liability may only be escaped by proving the defence of *force majeure* or *faute de la victime*.

The courts and the legislature have also introduced exceptions to the principle of *non-cumul*.[69] In fact, the courts have applied the law of tort to contractual relationships in cases involving fraudulent behaviour,[70] criminal offences,[71] transport accidents[72] and construction defects.[73] Moreover, the legislature has introduced general liability regimes that apply to all road traffic accidents[74] and to all defective products,[75] irrespective of whether a contract exists between the parties involved.

In recent years, the French legislature has begun reforming the law of obligations. All claims for damages are now subject to a general rule on prescription.[76] The general fault liability has been codified in Articles 1240-1241 CC, and the strict liability for persons and things has been codified in Article 1242 CC.[77] A reform of the remaining parts of the law of obligations is currently on the legislative agenda. In its proposals, the Minister of Justice has suggested harmonising several rules in respect of damages and causation.[78] He has also recommended codifying the principle of *non-cumul*. The wording of the proposed Article 1233 CC makes it clear that 'in the case of non-performance of a contractual obligation, neither the debtor nor the creditor may escape the application of provisions special to contractual liability in order to opt in favour of rules specific to extra-contractual liability'.[79]

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69 In some cases, the courts have even denied the existence of a contractual relationship, in order to be able to apply the law of tort. This is, however, not really an exception to the rule, because the laws of contract and tort do not overlap in those cases. See for some examples Viney 1995, p. 620; Von Bar & Drobnig 2004, p. 40-41.

70 Viney 1995, p. 621, with references.

71 This exception originates from the case law of the criminal courts, who used to apply the law of tort on a claim for compensation brought by the victim in the course of the criminal proceedings. The exception is outdated since the legislature gave criminal courts the authority to apply 'des règles de droit civil', including the law of contract. See Viney 1995, p. 621-623, with references.

72 For some time, close relatives of the victim of a transport accident could not only claim in contract, but also in tort. See Viney 1995, p. 623-624, with references.

73 This exception concerns the recovery of damages by the owner from the builder. See Viney 1995, p. 624-626, with references.

74 Art. 1, *Loi Badinter*.

75 Art. 1386-1 CC. This is a result of the implementation of Council Directive 85/374/EEC on the liability for defective products.

76 Art. 2224 CC, modified by *Loi n°2008-561 du 17 juin 2008*.

77 As a result of *Ordonnance n° 2016-131*.

78 Art. 1235-1240, *Projet de réforme du droit de la responsabilité civile*.

79 Ibid., Art. 1233: 'En cas d'inexécution d'une obligation contractuelle, ni le débiteur ni le créancier ne peuvent se soustraire à l'application des dispositions propres à la responsabilité contractuelle pour opter en faveur des règles spécifiques à la responsabilité extracontractuelle.' Translated into English by Simon Whittaker, in consultation with Jean-Sébastien Borghetti. This translation is available via www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf.

At the same time, the Minister intends to introduce an exception for bodily injuries. The Catala committee had already suggested giving these victims the choice between claiming in contract or in tort.[80] The Terré committee went one step further and proposed that bodily injuries should only ever be subject to the law of tort.[81] The latter suggestion was initially embraced by the Minister.[82] This would have led to the result that a person who had sustained bodily injuries could not have claimed in contract at all, even when the contract had contained more favourable terms.[83] Responding to this criticism, the Minister has proposed to add that the victim may not only rely on the law of tort, but also on 'express stipulations of a contract which are more favourable to him than the application of the rules of extra-contractual liability'.[84] If implemented, this rule would permit a choice between finding liability in contract and in tort, thus introducing another exception to the principle of *non-cumul*.

It is clear from the above that French law is still struggling with the relationship between the laws of contract and tort. Following the majority of scholars and responding to the expanding scope of the general strict liability for things, the courts have, gradually yet firmly, established the principle of *non-cumul*. At the same time, the courts and the legislature have provided certain contracting parties with additional protection, either by implying *obligations de sécurité* or by introducing exceptions that reduce the scope of the principle of *non-cumul*. In spite of these developments, the principle of *non-cumul* will probably be codified in the near future. As a consequence, the point of departure under French law remains fundamentally different to the position adopted in German, Dutch and English law. In these jurisdictions, finding liability in tort is not precluded if the damage is caused by or related to the performance, or non-performance, of a contractual obligation, as the following sections illustrate.

3.5 German and Dutch Law: independent yet interdependent categories

The question whether, and to what extent, the law should permit a choice between finding liability in contract and in tort has also been the subject of an ongoing debate in German literature. The two main positions emerged

80 Art. 1341, *Avant-projet de réforme du droit des obligations et du droit de la prescription*. This solution had been suggested before, e.g. by Carbonnier 1994, no. 295.

81 Art. 3, see Terré 2011.

82 Art. 1233 (2), *L'avant-projet de réforme de la responsabilité civile*.

83 For this reason, the proposal has been criticised, e.g. by De Graaff & Moron-Puech 2017, p. 86-87.

84 Art. 1233-1 (2), *Projet de réforme du droit de la responsabilité civile*: 'Toutefois, la victime peut invoquer les stipulations expresses du contrat qui lui sont plus favorables que l'application des règles de la responsabilité extracontractuelle.' Translated into English by Simon Whittaker, in consultation with Jean-Sébastien Borghetti.

during a period of approximately thirty years after the introduction of the *Bürgerliches Gesetzbuch* in 1900. Both sides pleaded for a clear distinction between contract and tort but drew different conclusions. At one end of the spectrum, writers defended the fundamental priority of the law of contract and the subsidiarity of the law of tort. At the other end of the spectrum, writers defended the fundamental independence of both regimes, which would imply that recourse to the law of tort should remain possible.

According to the first theory (*Gesetzeskonkurrenz*),[85] it is only the law of contract which is tailored and therefore designed to deal with the relationship between contracting parties. Even if a claim in tort seems, *prima facie*, possible, such a claim should be repressed in favour of the law of contract. If this were not to be the case, the balance of interests and the allocation of risks achieved under the rules and terms governing the contract would be undermined. In effect, this would render large areas of the law of contract pointless and would overrule the assessments and intentions of the legislature.[86]

According to the second theory (*Anspruchskonkurrenz*), the interests of contracting parties should also be protected by the law of tort. The law of contract cannot be regarded as a special part of the law of tort, as the latter is not based on one all-embracing, general clause and does not protect against purely economic losses. A breach of contract does not therefore automatically constitute an unlawful act or omission.[87] Additionally, the law of tort cannot be regarded as subordinate because it cannot be maintained that the law of contract, which deals with the rights and duties of contracting parties, also settles the legal consequences of unlawful acts or omissions exhaustively.[88] Since the two bodies of law are independent, they should be treated independently, allowing the aggrieved party to claim damages on any basis, as long as the necessary conditions (*Tatbestände*) are present.[89]

Following the contribution by Dietz to the subject in 1934, the second theory gained the upper hand and came to enjoy general support.[90] Its acceptance by German courts dates back to 1916, when the *Reichsgericht* held that the general legal duty not to injure another person exists towards all persons, whether they have concluded a contract or not.[91] Likewise, the *Bundesgerichtshof* has repeatedly confirmed that the aggrieved party may

85 It must be noted that the term *Gesetzeskonkurrenz* has also been used in a different sense, to describe the overlap of multiple norms rather than the exclusivity of one of these norms, e.g. by Lent 1912, p. 12 et seq.; Enneccerus & Nipperdey 1952, p. 217-218.

86 E.g. Hellwig 1900, p. 98-99; Endemann 1903, p. 1260; Von Gierke 1917, p. 903; Von Tuhr 1918, p. 464.

87 Dietz 1934, p. 72-92.

88 Dietz 1934, p. 93-124.

89 Dietz 1934, p. 125-180. For an overview of the literature until the 1930s, see Dietz 1934, p. 70-71.

90 Schlechtriem 1972, p. 44-45.

91 Reichsgericht 13 October 1916, RGZ, 88, 433.

choose which legal ground he wishes to base his claim for damages on, and that every claim has to be decided on its own merits and according to its own rules. The aggrieved party may also revert to the law of tort when the contractual claim is time-barred or excluded.[92]

This position can be explained by a number of factors. Firstly, the ambit of the German law of tort is narrower than in France. Not every breach of contract gives rise to tortious liability. Contractual rights are not protected under § 823 BGB, pure economic loss is generally not recoverable in tort and strict liability only exists on the basis of specific rules more limited in scope.[93] Secondly, the law of contract has important advantages over the law of tort. The claimant does not have to argue (and if contested, prove) fault in order to claim damages. It is up to the defendant to argue (and if contested, prove) that the breach of contract cannot be imputed to him.[94] Moreover, a contracting party is strictly liable for the conduct of those employed in performing his obligation (§ 278 BGB) and this party cannot escape liability if reasonable care was exercised by him when selecting and managing these employees, as is the case under the law of tort (§ 831 BGB). In this context, giving the claimant the choice to proceed on either basis will not have major consequences.[95]

This raises the question why the parties nonetheless tried to claim in tort, and why the courts allowed such claims. For a long time, compensation for non-economic loss (*Schmerzensgeld*) could only be awarded in tort, for example, for injuries to body or health and in case of a deprivation of liberty,[96] and not in contract.[97] Moreover, the prescription periods in contract were sometimes much shorter. For instance, the time limits for claims concerning the non-conformity of goods were very short: six months or one year after delivery or transfer of the property.[98] It was only after the *Schuldrechtsreform* of 2002 that the rules on damages were integrated into the general part of the law of obligations (§ 249 et seq. BGB). Since these reforms, compensation for non-economic loss can also be awarded in contract, for injuries to body or health, or for violations of the right to freedom or of the right to sexual self-determination (§ 253 BGB). Moreover, the legislature adopted one regime on prescription (§ 195 et seq. BGB), although specific rules still exist for certain types of claim.[99]

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92 BGH 24 November 1976, BGHZ 67, 359; BGH 4 March 1971, BGHZ 55, 392. See recently BGH 11 February 2004, VIII ZR 386/02.

93 Van Dam 2013, p. 90.

94 Currently § 28 (1) BGB, formerly § 282 BGB.

95 Cf. Zimmermann 1996, p. 905-906.

96 Formerly § 847 BGB.

97 Formerly § 253 BGB.

98 Formerly § 477 BGB.

99 E.g. the special time periods applicable to claims relating to non-conformity of the goods (§ 438 BGB; § 634a BGB), to travel contracts (§ 651g (2) BGB), to rental agreements (§ 548 BGB), to commercial transport (§ 439 HGB).

While the solution of *Anspruchskonkurrenz* may have been helpful at the time, it does also have its drawbacks. It is as straightforward as the *non-cumul* principle. One of the regimes is excluded, not as a matter of principle, but rather as a result of the claimant's choice. Without restrictions, this may frustrate the purpose of contractual rules. It is therefore widely accepted that the freedom of the claimant to pursue any claim he wishes may be limited if the objective of one of the rules would otherwise be undermined. In fact, the courts have already been applying standards for contractual liability[100] and shorter contractual prescription periods[101] on concurrent tort claims for a long time. The *Bundesgerichtshof* has repeatedly stated that while the conditions, content and enforcement of every claim are required to be assessed independently, an exception must be made when it is clear that a certain provision regulates a certain situation exhaustively, which may exclude or limit the possibility of claiming on another legal basis.[102] Although it is the exception and not the rule,[103] it is clear that contractual rules may thus affect the existence and substance of the tort claim.[104]

This has been an argument for some writers to assume that the claimant does not have two separate claims (*Anspruchskonkurrenz*) but a single claim, based on two separate norms (*Anspruchsnormenkonkurrenz*).[105] This theory shifts the problem, but does not solve it. It is uncontroversial as long as the application of the relevant norms would lead to the same legal outcome. Yet the theory lacks clarity, even amongst its proponents, as soon as the differences become apparent and the existence and content of the particular claim must be determined.[106] The majority of the writers therefore continues

100 E.g. the rule that the donor (*Schenker*, § 521 BGB), the lender (*Verleiher*, § 599 BGB) and the board (*Geschäftsführung*, § 680 BGB) can only be held liable in the event of willful conduct (*Vorsatz*) or gross negligence (*grobe Fahrlässigkeit*) also applies to a tort claim against the donor (BGH 20 November 1984, BGHZ 93, 23), the lender (BGH 23 March 1966, BGHZ 46, 140) and the board (BGH 30 November 1972, NJW 1972, 475). And the rule that the depository (*Verwahrer*, § 690 BGB) and the shareholder (*Gesellschafter*, § 708 BGB) can only be held liable if they did not exercise the care they can be expected to exercise when managing their own affairs, also applies to a tort claim against the depository (BGH 23 March 1966, NJW 1967, 42) and the shareholder (BGH 20 December 1966, BGHZ 46, 313).

101 The prescription period for claims by the landlord (§ 548, formerly § 558 BGB) also applies to a tort claim (BGH 31 January 1967, BGHZ 47, 53; BGH 24 May 1976, BGHZ 66, 315; BGH 8 January 1986, NJW 1986, 1608). The prescription period for claims by the lender (§ 606 BGB) also applies to a tort claim (BGH 31 January 1967, BGHZ 47, 53).

102 This general rule of interpretation is emphasised again in BGH 22 July 2014, KZR 27/13, at 53, with references to earlier case law.

103 E.g. the standards for the contractual liability of the *Gesellschafter* (§ 708 BGB) are not applicable when the extra-contractual claim concerns a road accident (BGH 20 December 1966, BGHZ 46, 313).

104 This phenomenon is also known as *einwirkende Anspruchskonkurrenz*, see Georgiades 1968, p. 86-90.

105 Georgiades 1968, p. 167 et seq. The same position was adopted by Hellwig 1900, p. 98-99; Esser 1960, § 201; Larenz 1962, p. 416 et seq.; Eichler 1963, p. 418-420.

106 Arens 1970, p. 400 et seq.; Medicus 2007, p. 7.

to adhere to the theory of *Anspruchskonkurrenz*,[107] but recognises that the possibility to proceed in contract or in tort may be limited.[108]

It is interesting to make a brief comparison between this position and the approach followed in the Netherlands. Dutch writers have essentially put forward the same arguments as their French and German colleagues, although the structure of the law is not entirely comparable.[109] As in Germany, the claimant does not have to argue (and if contested, prove) fault in order to claim damages. It is up to the defendant to argue (and if contested, prove) that the breach of contract cannot be imputed to him (Art. 6:74 BW). While strict tortious liabilities only exist on the basis of specific rules with a more limited scope than in France (Art. 6:169-184 BW), the scope of the regime of fault-based liability in tort appears to be more extensive than in Germany. The formulation of the duty of care is quite general – one has to comply with 'rules of unwritten law pertaining to proper social conduct'[110] – and, in addition, there is no separate category of pure economic loss and hence no exclusion of such losses from the scope of the law of tort.[111]

In accordance with the former Dutch Civil Code, which was heavily influenced by the French *Code Civil*, the *Hoge Raad* had already made clear that an act or omission may constitute both a failure in the performance of an obligation and a ground for tortious liability provided the liability in tort exists 'independently of the violation of a contractual obligation'.[112] Whether that was the case, had to be determined by looking at the purpose of the violated norm, the nature of the conduct and the additional circumstances of the case.[113] A mere breach of contract was not enough.[114] If a

107 An exception is Koziol 2010, p. 101-103.

108 Recent examples include Gsell 2003, p. 319-357; Medicus & Lorenz 2015, § 33; Wandt 2017, p. 5-11. For an overview of the literature, see Von Amsberg 1994, p. 19-21.

109 In favour of exclusive application of the law of contract e.g. Schoordijk 1964; Boukema 1966, p. 121 et seq.; Pels Rijcken 1980, p. 1125. Against exclusive application e.g. Snijders 1973; Nieuwenhuis 1982; Brunner 1984, p. 66; Bakels 2009a, no. 15; Castermans 2012; Castermans & Krans 2019, p. 69-76.

110 This rule has been laid down by the *Hoge Raad* in HR 31 January 1919, *NJ* 1919/161, note W.L.P.A. Molengraaff (*Lindebaum/Cohen*) and has been codified by the legislature in Art. 6:162 (2) BW.

111 Art. 6:95 BW.

112 HR 9 December 1955, *NJ* 1956/157, note L.E.H. Rutten (*Boogaard/Vesta*): 'onafhankelijk van de schending van een contractuele verplichting'. The rule was already laid down in HR 6 May 1892, W 6183 (*Korf/Fhijnbeen*); HR 26 March 1920, *NJ* 1920/476 (*Curiel/Suriname*); HR 11 June 1926, *NJ* 1926/1049, note P. Scholten (*Canter Cremers/Otten*). It was reiterated in HR 6 April 1990, ECLI:NL:HR:1990:AD4737, *NJ* 1991/689, note C.J.H. Brunner (*Van Gend & Loos/Vitesse*); HR 19 February 1993, ECLI:NL:HR:1993:ZC0870, *NJ* 1994/290, note C.J.H. Brunner (*Gem. Groningen/Zuidema*); HR 6 December 1996, ECLI:NL:HR:1996:ZC2219, *NJ* 1997/398 (*Fortes/Smits*).

113 Cf. HR 3 December 1999, ECLI:NL:HR:1999:AA3818, *NJ* 2000/235, note P.A. Stein (*Pratt & Whitney/Franssen*), at. 3.5.

114 HR 23 May 1856, *Weekblad van het Regt* 1852 (*Kuyk/Kinker*).

concurrent tortious liability existed, the claimant might choose to proceed on that basis. Evading the shorter prescription periods under the law of contract was one of the reasons for trying to do so. The drafters of the new Dutch Civil Code were well aware of such problems.[115] They decided to harmonise certain rules governing the different liabilities, thereby reducing the tensions between them. Since 1992, the Dutch Civil Code has contained a general regime for damages (Art. 6:95 et. seq. BW) and a general regime for the prescription of claims (Art. 3:310 BW).

Differences continue to exist however. Giving the claimant an unconditional freedom to claim in tort may then frustrate the purpose of contractual rules. As in Germany, an exception is therefore made when this is prescribed by, or inevitably follows on from, statutory law.[116] The courts have, for instance, applied standards for contractual liability[117] and shorter contractual prescription periods[118] on concurrent tort claims. Limitations may also follow from the express terms of the contract or from its nature and purpose.[119] Moreover, case law shows that the level of the general duty of care may be influenced by the contractual obligations of the parties.[120]

As in Germany, this has been an argument for some writers to assume that the claimant only has one 'mixed' claim (*gemengd vorderingsrecht*), based on two separate norms.[121] This theory has come up against comparable objections. Given that the outcome of a dispute also depends on the arguments between the parties and on the scope of the duty of the courts to apply the law *ex officio*,[122] it is argued that every claim has to be assessed on its own merits[123] but that the existence and content of the tort claim may be influenced by contractual rules.[124]

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115 As is evidenced by the contribution written by Snijders 1973, who was closely involved in the final drafting process of the new Dutch Civil Code.

116 As repeated in HR 15 June 2007, ECLI:NL:HR:2007:BA1414, *NJ* 2007/621, note K.F. Haak (*Fernhout/Essent*), at 4.2.

117 HR 2 March 2007, ECLI:NL:HR:2007:AZ3535, *NJ* 2007/240, note J.M.M. Maeijer (*Holding Nutsbedrijf Westland*), at 3.4.4.

118 HR 21 April 2006, ECLI:NL:HR:2006:AW2582, *NJ* 2006/272 (*Inno/Sluis*); HR 29 June 2007, ECLI:NL:HR:2007:AZ7617, *NJ* 2008/606, note J. Hijma (*Pouw/Visser*).

119 HR 27 April 2001, ECLI:NL:HR:2001:AB1335, *NJ* 2002/54, note C.J.H. Brunner (*Donkers/Scholten*); HR 25 October 2002, ECLI:NL:HR:2002:AE7010, *NJ* 2004/556, note J. Hijma (*Bunink/Manege Nieuw Amstelland*).

120 HR 15 May 1981, ECLI:NL:HR:1981:AG4187, *NJ* 1982/237, note B. Wachter (*Temi IV/Jan Heymans*), at 3; HR 27 February 1987, ECLI:NL:HR:1987:AG5547, *NJ* 1987/584 (*Van der Peijl/Erasmus College*), at 3.4; HR 6 April 1990, ECLI:NL:HR:1990:AD4737, *NJ* 1991/689, note C.J.H. Brunner (*Van Gend & Loos/Vitesse*), at 3.2; HR 19 October 2007, ECLI:NL:HR:1990:AD4737, *NJ* 2007/565 (*Vodafone/ETC*), at 3.7.

121 Snijders 1973, p. 459-463; Nieuwenhuis 1982, p. 18-22. The *Hoge Raad* seems to adopt this position in HR 15 June 2007, ECLI:NL:HR:2007:BA1414, *NJ* 2007/621, note K.F. Haak (*Fernhout/Essent*), at 4.2.

122 Castermans & Krans 2009, p. 158-159.

123 Pels Rijcken 1980, p. 1102; Nieuwenhuis 2007b; Bakels 2009b, no. 22.

124 Castermans 2012.

3.6 English Law: independent yet interdependent categories

English law is exceptional because it is not built on the foundations of Roman law.[125] The law has never been codified, and has mainly been developed by individual precedents laid down by decisions from courts with different and sometimes overlapping jurisdictions.[126] Legal education has not traditionally been the domain of universities but of legal practitioners. It has been 'primarily practical and empirical, more the development of a professional skill than a scholarly science'.[127] This may explain why English lawyers have not written about the subject of concurrent liabilities with the conceptual flavour of French lawyers or with the doctrinal rigour of German lawyers.[128] Yet the subject has most definitely been familiar to English lawyers. It was not unusual that a plaintiff could choose between several forms of action, nor was it uncommon that one and the same matter could be brought either before a common law court or before a court of equity, leading to different possible outcomes.[129]

Although the basic distinction between contract and tort appeared already in the Middle Ages,[130] the law was not structured on the basis of these concepts until the mid-19th century. In 1873, there was a significant reform of the courts' structure and of the law of procedure. From the time of the entry into force of the Judicature Act in 1875, all divisions of the High Court and of the Court of Appeal became competent to apply all the rules and principles of English law.[131] The forms of action were abolished, so the claimant was no longer obliged to choose at the very start of the litigation process which of the different forms of action he was going to base his claim on.[132] At the same time, success in litigation still largely depended on the question of whether any cause of action was raised by the particular facts of the case.

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125 Contrary to the civilian tradition, see Zimmermann 1996, p. 1-33.

126 Zweigert & Kötz 1992, p. 187 et seq.

127 Zweigert & Kötz 1992, p. 198 et seq.

128 Weir 1984, p. 36 noted that there was 'almost no writing on the topic in England', referring only to Winfield 1931; Guest 1961; Poulton 1966.

129 Cases of misrepresentation, for example, could be brought before common law courts and before courts of equity. At common law, the defendant had to know of the untruth of the statement, or be reckless as to its truth. Later decisions in equity made clear that liability for misrepresentation could also be established for 'constructive fraud' or 'innocent mistake'. *Derry v. Peek* [1889] 14 App Cas 337 (HL) clarified that both equity and common law required fraud to establish liability. In turn, *Derry v. Peek* was confined, first in *Nocton v. Lord Ashburton* [1914] AC 932 (HL), and then in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465 (HL). About this development: Edelman 2014, p. 479-484. More examples of relations concurrently legal and equitable are given by Hohfeld 1913a, p. 553-554; Davies 2018b, p. 288-293; Taylor 2019, p. 26-27, 36-44.

130 Kegel 2002, p. 44 et seq.

131 Zweigert & Kötz 1992, p. 205-206.

132 Maitland 1910, p. 295 et seq. A heavy blow was struck already in 1852, when the Common Law Procedure Act 1852 provided that it should not be necessary to mention any form or cause of action in any writ of summons.

This question remained as important as ever before, as Maitland noted:

> 'The forms of action we have buried, but they still rule us from their graves.'[133]

The reform of the law of procedure made it necessary to systemise the liabilities that existed under the former forms of action. This task was undertaken by several writers, who published a series of influential textbooks in and around the 1870s.[134] Without a fundamental reconsideration of the general structure of the law of obligations, they assigned the existing liabilities to two legal categories and emphasised the distinction between them: liabilities were either consensual (contract) or non-consensual (tort).[135] This may have encouraged English lawyers to regard contract and tort as mutually exclusive.[136] Nevertheless, the categories did show a certain overlap from the outset. As Pollock observed soon after the abolition of the forms of action, some liabilities in contract 'are not founded on the breach of any agreement', while some torts 'are not in any natural sense independent of contract'.[137]

For a long time, however, the overlap was rather limited. The scope of the law of contract was, and still is, restricted by the doctrines of *consideration* and *privity*. Under the doctrine of consideration, a promise is not contractually binding if the other party has not done, or promised to do, something in return for this promise.[138] Under the doctrine of privity, a contract cannot confer rights or impose obligations on any person except the parties to it.[139] More important in this context is that the scope of the law of tort was restricted too, due to the relatively late emergence of the general duty of care in respect of negligence.

The foundation of the tort of negligence was laid down in *Donoghue v. Stevenson*. The House of Lords decided that a manufacturer owed a duty of care in negligence *irrespective* of the question whether the injured person was a party to the incidental contract of sale.[140] *Donoghue v. Stevenson* was not a unanimous decision nor was the reasoning clear and unambiguous. Today, however, it is regarded as the starting point of the modern law of negligence as it was the first time that the House of Lords recognised a general rule of liability for harm caused by negligence. This general duty

133 Maitland 1910, p. 296; Pollock 1887, p. 336.
134 Atiyah 1979, p. 681-693.
135 Weir 1984, p. 35.
136 According to Guest 1961, p. 191; cf. Markesinis 1987, p. 384.
137 Pollock 1887, p. 337. Cf. Weir 1984, p. 35.
138 This requirement is still an essential feature of English contract law, as can be seen in *MWB Business Exchange Centres Ltd v. Rock Advertising Ltd* [2018] 2 WLR 1603 (UKSC).
139 Although the doctrine of privity still stands up to scrutiny, the Contracts (Rights of Third Parties) Act 1999 does determine that a contract may confer rights on third parties which are enforceable directly by the third parties themselves.
140 *Donoghue v. Stevenson* [1932] AC 562 (HL). There are older cases that foreshadowed the development of the tort of negligence, see Atiyah 1979, p. 501-505, with references.

of care also applies when the parties are in a contractual relationship. Not every breach of contract will, however, lead to a liability in tort.[141] A concurrent liability in tort will only arise in the event that the defendant's behaviour would also have breached a tortious duty if there had *not* been a contract between the parties. In other words: the defendant must have violated an obligation to take reasonable care, independent of any obligation under the contract.[142]

The question whether the law allows the aggrieved party to bring a claim in tort used to arise primarily when negligent conduct of one contracting party caused physical damage to the body, health or property of another contracting party. The courts accepted that finding liability in tort was then possible.[143] Pure economic loss was a different matter. In *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*, the House of Lords accepted for the first time that a person (in that case: a bank) could be held liable in negligence in respect of pure economic loss resulting from reliance on a misstatement (in that case: an inaccurate credit reference).[144] This raised the question whether parties to a contract could also be held liable in negligence in respect of pure economic loss. The courts both allowed and rejected concurrent liabilities in this field.[145]

This question was authoritatively addressed by the House of Lords in *Henderson v. Merrett Syndicates*. The case concerned a collection of claims brought by the members (known as 'names') of the insurer, Lloyd's, against the managing agents who had acted on their behalf. The managing agents were either in a direct contractual relationship with the names or were indirectly linked with them through agents. The names alleged that in both situations the managing agents had assumed a direct responsibility to the names. The names that entered into a contract with the agents wanted to establish a concurrent duty of care in tort, in order to benefit from the more advantageous position on the accrual of the cause of action in tort.[146]

In his leading speech,[147] Lord Goff clearly showed his concern about the 'adventitious effects' of the existence of different rules in contract and tort as regards limitation and remoteness of damage. He indicated that reform

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141 Pollock 1887, p. 339 already noted that a mere non-performance of a promise cannot be treated as a substantive tort. *Robinson v. PE Jones (Contractors) Ltd* [2011] EWCA Civ 9 also makes clear that the mere existence of a contractual relationship is not enough to justify an assumption of responsibility and concomitant reliance.

142 Weir 1984, p. 36; Burrows 1998, p. 25-26.

143 Burrows 1998, p. 25-26, with references.

144 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL). See, for an overview of the speeches, Robertson & Wang 2015, p. 51-55.

145 The cases are mentioned by Burrows 1998, p. 26, and summarised by Lord Goff in *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL), at 184-194, with special attention for the statement by Lord Scarman in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1986] UKPC 5 (PC).

146 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL), per Lord Goff, at 174.

147 All Lords agreed with the speech of Lord Goff. Lord Browne-Wilkinson delivered a short concurring speech.

of these incidental rules would be most welcome but readily admitted that 'this is perhaps crying for the moon'.[148] After a careful assessment of the most important authorities,[149] including cases from other civil and common law countries,[150] Lord Goff reached the following conclusion:

> 'My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy: but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.'[151]

The House of Lords thus allowed finding liability in negligence in respect of pure economic loss, also where the parties were in a contractual relationship. Unless 'his contract precludes him from doing so', the claimant, 'who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous'.[152]

The fact that tortious liability may arise if the damage is caused by or related to the performance, or non-performance, of a contractual obligation shows that the division between contract and tort is not as sharp as might be imagined. Even before *Henderson v. Merrett Syndicates*, Atiyah had already argued that this division was 'not soundly based, either in logic or in history',[153] while Gilmore observed that 'the two fields, which had been artificially set apart, are gradually merging and becoming one'.[154] Gilmore coined the term 'contort' to describe this phenomenon. He predicted that the law of contract would eventually 'be swallowed up by tort', or that both areas of law would be unified in a 'generalized theory of civil obligation'.[155]

Up until the present date, English law is not structured on the basis of such a general theory of obligations.[156] The law of contract has not been 'swallowed up' by the law of tort either. Since *Henderson v. Merrett Syndicates*, it has been debated whether, and to what extent, the tortious remedy should be influenced, limited or excluded by the contract. Should

148 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL), at 186.
149 One case is discussed in particular: *Midland Bank Trust Co Ltd v. Hett Stubbs & Kemp* [1979] Ch 384 (HC).
150 The contribution written by Weir 1984, is quoted often and has clearly influenced the outcome.
151 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL), at 193-194.
152 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL), at 193-194.
153 Atiyah 1979, p. 505.
154 Gilmore 1974, p. 88.
155 Gilmore 1974, p. 88, 90 and 94.
156 Although some writers have developed such a theory, e.g. Burrows 2013.

the contractual remoteness test, for instance, also be applied to a concurrent claim in negligence for pure economic loss?[157] In a unanimous judgment, the Court of Appeal decided that the test for recoverability of damage for pure economic loss should indeed be the more restrictive 'reasonable contemplation' test in contract and not the 'reasonable foreseeability' test in tort.[158] Case law also shows that the level of the contractual duty is relevant in determining whether there was an assumption of responsibility.[159] Even though the duty of care imposed by the law is independent of the contractual duty, the contractual context may influence its content,[160] as is the case in Germany and the Netherlands.

3.7 Conclusion

The concurrence of the laws of contract and tort presents challenges to any system of private law. Yet their solutions differ. French law excludes the possibility to claim in tort if the damage is caused by or related to the performance, or non-performance, of a contractual obligation. German, Dutch and English law take the opposite point of view: finding liability in tort is not precluded if the damage is caused by or related to the performance, or non-performance, of a contractual obligation.

In theory, several arguments have been given for and against both solutions. Proponents of a fundamental precedence of the law of contract over the law of tort assert that this solution respects the freedom of contract and the intention of the legislature. Parties to a contract should not be able to 'escape' from the regime designed for those relationships into the general regime of tort. By contrast, their adversaries argue that the law of tort should offer a certain level of protection to all persons, whether they have concluded a contract or not. The basic principle should therefore be the opposite: in the absence of a clear intention, on the part of the legislature or the parties themselves, the mere existence of a contract should not *a priori* set aside the protection provided by the law of tort.

In practice, the choice between these competing solutions is also influenced by the scope and structure of the laws of contract and tort. French courts have not merely drawn a rigid demarcation line between the two regimes out of a genuine concern for the freedom of contract and the will of the legislature, but also to protect contracting parties against the general strict liability for things fostered by the courts themselves. German, Dutch and English courts have not merely allowed concurrent claims in tort

157 As proposed by Burrows 2011. Cf. Cartwright 1996.

158 *Wellesley Partners LLP v. Withers LLP* [2015] EWCACiv 1146. An overview of the speeches is given by Taylor 2019, p. 34-36.

159 *Riyad Bank v. Ahli United Bank (UK) Plc* [2006] EWCA Civ 780 (CA); *Robinson v. PE Jones (Contractors) Ltd* [2011] EWCA Civ 9.

160 Taylor 2019, p. 32-36.

because that solution suited the structure of their systems of private law, but also to protect contracting parties when it would not be justified to treat them less favourably than passers-by would be treated. In these systems, the expansion of tort law seems to have been the price of a rigid contract law, to use the expression coined by Markesinis.[161]

This chapter has shown that the resoluteness of both approaches has softened over time. Under German, Dutch and English law, the contractual relationship continues to be relevant to the assessment of the tort claim. It cannot be said that these legal systems do not respect the will of the parties and the intention of the legislature. Germany and the Netherlands have, moreover, harmonised the rules on the scope of damages and the prescription of claims. The dust is settling in English law too, as the courts are called upon to indicate which test applies to a concurrent claim in tort. As a result of these judicial and legislative interventions, the scope of the problem has been further reduced.

A trend towards convergence can even be observed in France. To be sure, recourse to the law of tort remains generally excluded. However, several newly adopted liability regimes do transcend the boundaries of contract and tort. In the near future, the French legislature also intends to harmonise the rules on damages and causation. It must be noted, moreover, that the courts have provided additional protection to contracting parties, not only by introducing exceptions to the principle of *non-cumul* but also by imposing *obligations de sécurité*. In France, therefore, the expansion of contract law seems to have been the price of the exclusion of tort law.

Importantly, this case study reminds us that the decision to permit or restrict the availability of claims, powers, and defences depends on the content of the rules and the structure of the legal system at issue. What appears at first to be the same problem – the overlap of the laws of contract and tort – may turn out to have a different nature and scope in different jurisdictions. We should be aware that the courts may be inclined to protect certain interests by denying the possibility of dual application altogether. It is submitted that this finding does not, however, call in question the scheme of analysis as such. Rather, it shows that questions of concurrence are questions of interpretation which may be answered differently, depending on the scope and structure of the relevant rules.

Having considered in greater detail the reasons underlying the decision to permit or restrict the availability of claims, powers, and defences, it is time to embark on the next leg of our journey. What – if any – is the impact of the laws of the European Union? How do these laws influence our scheme of analysis?

161 Markesinis 1987.

4 Concurrence in European Private Law: Two Underlying Propositions

4.1 Introduction

The previous chapters have explained the scheme of analysis by which questions of concurrence are debated and solved within national systems of private law. In the current multilevel legal order, private relationships are not merely subject to national rules but also, and increasingly so, to international legal regimes. It has become particularly important to fathom the impact of the laws of the European Union, and to understand their interaction with the domestic systems of legal protection. This prompts the question whether the previous chapters can be of any assistance here. May the scheme of analysis, conceived and fostered in the context of the national systems of private law, also be used when the overlapping rules, or some of them, originate from Union law?

Before we turn to examine this question, it is important to take a step back and substantiate in more detail two underlying propositions. The first proposition is that the bodies of primary and secondary Union law contain rules that are comparable to the rules we have examined in the previous chapters. In order to test this proposition, this chapter first outlines the sources of Union law and their effects in the national legal orders (section 4.2). The chapter then shows that Union law provides individuals with a range of claims, powers, and defences. Building on previous research,[1] this chapter provides a comprehensive overview of these rules. To that end, it does not limit itself to one particular source of law or policy area, but examines the rules governing private relationships across the full spectrum of Union law, paying due attention to the activities of both the Union legislature and the Court of Justice of the European Union (sections 4.3-4.4).

The second proposition is that the objectives of each rule, regardless of its source, should be realised to the greatest possible extent. At first sight, this position seems difficult to square with the idea of a fixed hierarchy, both within the Union legal order and as regards the relationship between Union law and the national legal orders. Should we not start from the premise that rules with a higher status override rules lower down the hierarchy? On second thought, it appears that the question *whether* one rule trumps another rule is a question of interpretation which cannot be answered on the basis of the Kelsen model, so this chapter argues (section 4.5). The

1 See e.g. Dougan 2011, p. 430 and 435-437; Wilman 2016, p. 890-896; Ackermann 2018, p. 758-763; De Graaff & Verheij 2019.

chapter concludes that it is necessary to examine in more detail how Union law deals with questions of concurrence (section 4.6).

4.2 The sources of Union law and their effects

We have seen that issues of concurrence are caused by the overlap and conflict of legal rules. These rules may be written or unwritten, statutory or judge-made, enforceable only inside or also outside the courts. Yet regardless of their precise legal source, certain types of rules occupy centre stage in any system of private law. The attention is fixed on the claims that enable a person to demand some performance from another person and on the powers that enable a person to create, modify or extinguish a legal position or relationship. Viewed from the angle of the defendant, emphasis is laid on the rules that may be relied upon as defences to resist the enforcement of a claim or the exercise of a power.[2]

Rules of Union law also originate from different sources. They may be based on binding agreements between the Member States, such as the Treaty on the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), and the Charter of Fundamental Rights (the Charter). Some rules have been developed by the Court of Justice under the flag of the general principles of Union law.[3] And many rules have their origins in acts adopted by the Union legislature, in regulations and in directives.[4] This prompts the question whether these rules are comparable to the rules we have examined in the previous chapters. Do they create rights – more particularly claims, powers, and defences – that can be relied upon by one individual against another individual?

The natural starting point for any discussion about the creation of rights in Union law is the theory of direct effect. This theory teaches us that only rules that are sufficiently clear, precise and unconditional are capable of being applied directly, without national law serving as an intermediary.[5] According to the Court of Justice, the consequence of direct effect is that Union law creates rights upon individuals which they can enforce before the domestic courts.[6] The Court has thus tied the two concepts – rights and

2 *Supra* sections 1.3 and 2.3.

3 As these general principles have been read into the founding treaties, they are usually considered part of primary Union law, e.g. by Craig & De Búrca 2015, p. 193-196; De Witte & Smulders 2018, p. 196-198.

4 Art. 288 TFEU also mentions decisions, recommendations and opinions, but they are not discussed here because they do not serve as sources of binding general rules.

5 Craig & De Búrca 2015, p. 192.

6 Already apparent in Case 26/62, *Van Gend & Loos v. Administratie der Belastingen*, ECLI:EU:C:1963:1, where the Court held that Article 12 of the Treaty establishing the European Economic Community 'must be interpreted as producing direct effects and creating individuals rights which national courts must protect'.

direct effect – together.[7] This position raises two important questions. What kinds of rights do directly effective provisions create? And if only directly effective provisions create enforceable rights, should we then confine our attention to this category of legal rules?

The first question has already kept scholars busy for a long time. They have constructed a narrow and a broad definition of direct effect.[8] Proponents of the broad definition, also known as *objective* direct effect, approach the issue from the perspective of the courts. For them, the key question is whether a provision of Union law 'is sufficiently operational in itself to be applied by a court'[9] or by another authority.[10] This does not mean that every provision will always have the same kind of effect. It is widely accepted that rules may serve as sources of substantive rights – the so-called *substitutionary* effect – and as standards to review the legality of national law – the so-called *exclusionary* effect.[11]

Advocates of the narrow definition, on the other hand, focus on the relationship at issue rather than on the role of the courts. For them, the key question is whether a provision of Union law creates a substantive right and a corresponding obligation which would not otherwise have existed on the basis of the applicable national law. Viewed from this angle, legality review is not a form of direct effect, because it does not create a right and a corresponding obligation between the parties, but only excludes a conflicting national legal rule.[12] This narrow definition, also known as *subjective* direct effect, seemed to have gone out of fashion but has recently found new support among private lawyers.[13]

The divide between these positions is by no means as large as might be imagined.[14] At the end of the day, writers on both sides agree that Union law may be relied upon for various reasons and that its application by the courts may lead to different results. In the present context, it should be noted that the meaning of the term 'right' changes accordingly. On the one hand, the term is used, not least by the Court of Justice itself,[15] to refer to a

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7 Timmermans 1979, p. 539; Ruffert 1997, p. 315; Prechal 2005, p. 99.

8 Timmermans 1979, p. 537-544; Prechal 2005, p. 99-106; De Witte 2011, p. 330-331; Craig & De Búrca 2015, p. 185-186.

9 Opinion A-G Van Gerven, C-128/92, *H.J. Banks & Co. Ltd v. British Coal Corporation*, ECLI:EU:C:1993:860, at 27.

10 Added by Prechal 2005, p. 241.

11 Prechal 2005, p. 241; Dougan 2007, p. 933-934, 937-938; De Witte 2011, p. 331; McDonnell 2018, p. 430-431. See also Opinion A-G Saggio, Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores v. Rocío Murciano Quintero and Others*, ECLI:EU:C:1999:620, at 37-39.

12 E.g. Lenaerts & Corthaut 2006, p. 291-292, 309-310.

13 Consider e.g. Hartkamp 2013, p. 195-196; Sieburgh 2015, p. 3-4; Verbruggen 2017, p. 59-60; and the authors contributing to Hartkamp, Sieburgh & Devroe 2017. These authors label legality review as a form of *indirect horizontal effect*.

14 Timmermans 1979, p. 538-539; Dougan 2007, p. 937-940; Engström 2009, p. 13-14.

15 E.g. in Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung*, ECLI:EU:C:2018:257, at 76 and 78; Case C-68/17, *IR v. JQ*, ECLI:EU:C:2018:696, at 69.

general right to 'rely on' Union law. This right corresponds to a duty on the courts to apply Union law and, if need be, to set aside conflicting national laws in the cases arising before them.[16] On the other hand, the term is used to indicate a more specific entitlement of an individual against one or more others, such as restitution, specific performance or compensation.[17]

In the previous chapters, we have focused on the latter category of rights. In the parlance of Union law, we have been concerned with substitution rather than exclusion. It would, however, be an error to focus only on substitutionary effects and to exclude exclusionary effects from the scope of this book. Leaving aside the question of whether the distinction between these categories is conceptually convincing,[18] it must be noted that the review of legality can – and often will – in substance operate as a defence. The defendant may argue that Union law precludes the application of the rule on which the claimant relies. Likewise, it may be possible for the claimant to reply that Union law precludes the application of the rule on which the defendant relies. For this reason, this book includes the review of national laws against directly effective provisions of Union law and treats it as a substantive defence.

The second question remains to be answered. Should we confine our attention to directly effective provisions? An affirmative answer would mean that we would largely exclude directives from the scope of our enquiry. Unlike regulations, directives are only binding 'as to the result to be achieved' and leave the national authorities 'the choice of form and methods'.[19] The Court of Justice maintains that directives cannot, therefore, of themselves impose obligations on individuals.[20] It is true that the Court has occasionally ruled that certain technical provisions of national law had to be set aside because they had been adopted without prior notification to the Commission,[21] or in defiance of an instruction by the Commission to postpone the adoption.[22] However, this exception – also named 'incidental' horizontal effect – is rather limited in scope. Setting aside national law on the sole basis of non-compliance with the requirements stemming from a directive is only possible if the directive 'does not in any way define the substantive scope of the legal rule on the basis of which the national court

16 Prechal 2005, p. 100.
17 Van Gerven 2000, p. 507; Prechal 2005, p. 97; Craig & De Búrca 2015, p. 186.
18 Dougan 2007, p. 937-940, argues that the distinction is arbitrary and difficult to maintain. In a similar vein, Craig & De Búrca 2015, p. 219-220.
19 Art. 288 TFEU.
20 Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84, at 48; Case C-91/92, *Paola Faccini Dori v. Recreb Srl*, ECLI:EU:C:1994:292, at 19-25; Case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, ECLI:EU:C:2012:33, at 37 and 42; Case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2, at 37; Case C-122/17, *David Smith v. Patrick Meade and Others*, ECLI:EU:C:2018:631, at 42-43.
21 Case C-194/94, *CIA Security International v. Signalson and Securitel*, ECLI:EU:C:1996:172.
22 Case C-443/98, *Unilever Italia v. Central Food*, ECLI:EU:C:2000:496.

must decide the case before it'.[23] We know that this is a high threshold.[24] We may, therefore, safely conclude that directives can only rarely be applied to exclude national laws and cannot, in any case, substitute them with novel rights.

Nevertheless, many directives do spell out these rights in great detail. Such directives leave little discretion to the national authorities, which means that the transposition into national law is almost entirely a matter of form.[25] It also means that the directives enable the courts to determine precisely the level of protection that must be provided by the domestic legal systems.[26] But instead of moving forward by declaring such provisions directly effective, the Court has gone astray and gradually, yet firmly, improved their effectiveness by strengthening the principle of consistent or harmonious interpretation. By now, it is clear that the whole body of national law, including established case law of the national courts,[27] must be interpreted 'so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive'.[28] It is possible to make exceptions, particularly for the

23 Case C-443/98, *Unilever Italia v. Central Food*, ECLI:EU:C:2000:496, at 51. This test has been confirmed in Case C-122/17, *David Smith v. Patrick Meade and Others*, ECLI:EU:C:2018:631, at 53.

24 In Joined Cases C-397/01 to C-403/01, *Pfeiffer and others*, ECLI:EU:C:2004:584, for instance, the Court held that a provision of German law was incompatible with the requirements under the Working Time Directive, but did not draw the conclusion that the provision at issue should be set aside. In Case C-122/17, *David Smith v. Patrick Meade and Others*, ECLI:EU:C:2018:631, at 53-55, the Court proceeded on the assumption that the national and contractual provisions at issue violated the Third Directive on insurance against civil liability in respect of the use of motor vehicles, but refused to order the court to set aside these provisions, because the case concerned a legal relationship between private persons.

25 Also observed by Johnston & Unberath 2006, p. 188-190; Twigg-Flesner 2011, p. 245; Wilman 2016, p. 893; De Witte & Smulders 2018, p. 211.

26 As the Court concluded in e.g. Case C-91/92, *Paola Faccini Dori v. Recreb Srl*, ECLI:EU:C:1994:292, at 12-18; Joined Cases C-397/01 to C-403/01, *Pfeiffer and others*, ECLI:EU:C:2004:584, at 102-106.

27 Case C-456/98, *Centrosteel v. Adipol*, ECLI:EU:C:2000:402, at 17; Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S, v. Estate of Karsten Eigil Rasmussen*, ECLI:EU:C:2016:278, at 33; Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung*, ECLI:EU:C:2018:257, at 72-73; Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften v. Tetsuji Shimizu*, ECLI:EU:C:2018:874, at 60; Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v. Maria Elisabeth Bauer* (C-569/16) *and Volker Willmeroth v. Martina Broßonn* (C-570/16), ECLI:EU:C:2018:871, at 68.

28 Joined Cases C-397/01 to C-403/01, *Pfeiffer and others*, ECLI:EU:C:2004:584, at 113; Case C-555/07, *Kücükdeveci v. Swedex*, ECLI:EU:C:2010:2148, at 48; Case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, ECLI:EU:C:2012:33, at 24; Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S, v. Estate of Karsten Eigil Rasmussen*, ECLI:EU:C:2016:278, at 31; Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften v. Tetsuji Shimizu*, ECLI:EU:C:2018:874, at 58; Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v. Maria Elisabeth Bauer* (C-569/16) *and Volker Willmeroth v. Martina Broßonn* (C-570/16), ECLI:EU:C:2018:871, at 66.

protection of legal certainty and legitimate interests,[29] but the thresholds are high.[30] What is more, the Court sometimes suggests that an interpretation of national law in conformity with the directive at issue should actually be possible.[31] National law may still be the formal vehicle, but the Court of Justice is squarely in the driver's seat.

Against this background, the second question must be answered in the negative. As we will see, many directives prescribe precisely which claims, powers, and defences should be made available under national law, and under what conditions. Such directives, and their interpretation by the Court of Justice, can tell us much about the way Union law deals with issues of concurrence in relationships between individuals. It is important to take note of these solutions, if only because national courts are under a duty to follow the same line of reasoning when interpreting and applying the implementing measures adopted at the national level. For these reasons, directives deserve to be examined in this book.[32] Before we plunge into the body of secondary Union law, however, the next section will provide an overview of claims and defences originating from primary Union law.

4.3 Primary Union law: claims and defences

We will not find many comparable rules when we browse the founding Treaties and the Charter. The Charter is principally addressed to the various institutions and agencies of the Union, and to the Member States when they are implementing Union law.[33] The Treaties are largely silent too when it comes to the relationships between individuals. Only Articles 101 and 102 TFEU clearly prohibit anticompetitive conduct of private undertakings.

29 E.g. Case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, ECLI:EU:C:2012:33, at 25; Case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2, at 39; Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S, v. Estate of Karsten Eigil Rasmussen*, ECLI:EU:C:2016:278, at 32; Case C-122/17, *David Smith v. Patrick Meade and Others*, ECLI:EU:C:2018:631, at 40.

30 Craig & De Búrca 2015, p. 212-216.

31 Case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, ECLI:EU:C:2012:33, at 26-31; Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S, v. Estate of Karsten Eigil Rasmussen*, ECLI:EU:C:2016:278, at 34.

32 The same reasoning is followed by Gruber 2004, p. 14-15, 19-20, 229. Hartkamp 2011, p. 158, on the other hand, excludes directives from the scope of his definition of concurrence because directives are not directly applicable.

33 Art. 51 (1) of the Charter. This does not mean, however, that the Charter cannot apply to relationships between individuals, as the Court made clear in Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften v. Tetsuji Shimizu*, ECLI:EU:C:2018:874, at 76-79; Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v. Maria Elisabeth Bauer* (C-569/16) *and Volker Willmeroth v. Martina Broßonn* (C-570/16), ECLI:EU:C:2018:871, at 87-90.

Moreover, Article 101 (2) TFEU expressly states that agreements that restrict or distort the competition within the internal market 'shall be automatically void'. This provision may be relied upon in order to support a claim under national law or to obtain a declaration of nullity, and is generally invoked as a defence to resist a claim for performance or a claim for damages for breach of contract.[34]

Apart from Article 101 (2) TFEU, the treaty and Charter provisions themselves do not provide much guidance about their effects in relationships between individuals. Clarification, therefore, has to come from the Court of Justice. Importantly, the Court has explained that any person is entitled to claim compensation for losses resulting from an anti-competitive agreement or practice prohibited under Article 101 TFEU.[35] Many writers assume that this right is conferred directly by the Treaties.[36] This conclusion has been supported by the Union legislature, not only with regard to infringements of Article 101 TFEU, but also with regard to losses resulting from the abuse of a dominant position prohibited under Article 102 TFEU.[37] In fact, the Court has recently confirmed that Article 102 TFEU may serve as a basis to claim compensation for the harm suffered as a result of the abuse of a dominant position.[38] The existence of a legal basis in the Treaties explains why the directive on damages for infringements of competition laws only deals with incidental issues, such as the extent of compensation, limitation, and joint and several liability.

Another example can be found in the case law on the right to paid annual leave, which is protected by Article 31 (2) of the Charter. In the view of the Court, this provision expresses 'an essential principle of EU social law' and includes not only the right to paid annual leave as such, but also 'the right, inherent in the former, to an allowance in lieu of annual leave

34 Odudu 2013, p. 395-415; Whish & Bailey 2015, p. 345; Devroe, Cauffman & Bernitz 2017, p. 34-37.

35 Case C-453/99, *Courage v. Crehan*, ECLI:EU:C:2001:465, at 26; Joined Cases C-295/04 to C-298/04, *Manfredi and Others*, ECLI:EU:C:2006:461, at 61; Case C-557/12, *Kone and others v. ÖBB-Infrastruktur*, ECLI:EU:C:2014:1317, at 22; Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204, at 26.

36 E.g. Komninos 2002; Drake 2006; Dougan 2011, p. 426-430; Havu 2012. See also Opinion A-G Wahl, Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:100, at 34-45.

37 Recitals 3-4, 7-8, 11 and 14 of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

38 Case C-637/17, *Cogeco Communications v. Sport TV Portugal and Others*, ECLI:EU:C:2019:263, at 40.

not taken upon termination of the employment relationship'.[39] The Court has also determined that Article 31 (2) of the Charter may, under certain circumstances, impose a 'corresponding obligation on the employer' to grant such periods of paid leave or to pay compensation as a substitution for the holidays accrued.[40] The latter right is 'pecuniary in nature', becomes 'part of the relevant person's assets' and 'may be passed on by inheritance' to the legal heirs of the employee.[41]

A third example can be found in the case law on Article 21 (1) of the Charter, which protects individuals against *any* discrimination on *any* ground. This provision played an important role in a case about the compatibility with Union law of Austrian legislation which required employers to give their employees a day off on Good Friday. The problem was that the legislature had granted this advantage only to members of certain Christian churches. If their employer nonetheless required them to work on Good Friday, these employees were entitled to an additional payment. No such entitlement existed in respect of non-Christian employees. Having concluded that such a legislative measure constitutes a form of direct discrimination on grounds of religion which cannot be justified on the basis of Directive 2000/78/EC on equal treatment in employment and occupation,[42] the Court examined whether Union law requires private employers to grant the same benefits to employees who do not belong to these Christian churches. The Court determined that all employees should enjoy the same treatment until Austrian legislation complies with Union law.[43] The Court concluded that employees who are not a member of any of the churches mentioned by the legislature are entitled, on the basis of Article 21 of the Charter, to a public holiday on Good Friday and also to the additional payment if their employer refuses their request to be absent from work on that day.[44]

Only rarely does the Court work out the impact of the application of a treaty or Charter provision upon legal relationships between individuals in such detail. The Court has, however, frequently assessed the conduct of private parties against the treaty and Charter provisions

39 Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v. Maria Elisabeth Bauer* (C-569/16) *and Volker Willmeroth v. Martina Broßonn* (C-570/16), ECLI:EU:C:2018:871, at 83 (and at 39 and 58); Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften v. Tetsuji Shimizu*, ECLI:EU:C:2018:874, at 72.

40 Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften v. Tetsuji Shimizu*, ECLI:EU:C:2018:874, at 79.

41 Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v. Maria Elisabeth Bauer* (C-569/16) *and Volker Willmeroth v. Martina Broßonn* (C-570/16), ECLI:EU:C:2018:871, at 48 and 62.

42 Case C-193/17, *Cresco Investigation v. Markus Achatzi*, ECLI:EU:C:2019:43, at 35-69.

43 Case C-193/17, *Cresco Investigation v. Markus Achatzi*, ECLI:EU:C:2019:43, at 79-83, referring to Case C-406/15, *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, ECLI:EU:C:2017:198, at 66-68.

44 Case C-193/17, *Cresco Investigation v. Markus Achatzi*, ECLI:EU:C:2019:43, at 85-86.

prohibiting discrimination,[45] and against treaty provisions banning restrictions of the free movement of citizens[46] and workers,[47] of the freedom of establishment,[48] and of the freedom to provide services.[49] Compensation was often at stake in the underlying legal proceedings. Yet it is questionable whether Union law itself confers a fully-fledged claim for damages and imposes a corresponding duty on an individual in these circumstances.[50] After all, the basic assumption, laid down by the Court in the leading cases *Rewe* and *Comet*, is that in the absence of relevant Union laws, the applicable national law governs such rights and duties.[51] This so-called principle of

45 The general prohibition of discrimination on grounds of nationality was at stake in Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115; Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101; Case 43/75, *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, ECLI:EU:C:1976:56; Case 251/83, *Eberhard Haug-Adrion v. Frankfurter Versicherungs-AG*, ECLI:EU:C:1984:397; Case C-411/98, *Angelo Ferlini v. Centre Hospitalier de Luxembourg*, ECLI:EU:C:2000:530; Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:497. Article 21 (1) Charter was dealt with in Case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2, at 47 (discrimination on grounds of age), and in Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung*, ECLI:EU:C:2018:257, at 76-79 (discrimination on grounds of religion or belief).

46 Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:497.

47 Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115; Case 251/83, *Eberhard Haug-Adrion v. Frankfurter Versicherungs-AG*, ECLI:EU:C:1984:397; Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463; Case C-176/96, *Jyri Lehtonen and Castors Braine v. FRBSB*, ECLI:EU:C:2000:201; Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano*, ECLI:EU:C:2000:296; Case C-94/07, *Andrea Raccanelli v. Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, ECLI:EU:C:2008:425; Case C-325/08, *Olympique Lyonnais v. Olivier Bernard and Newcastle United*, ECLI:EU:C:2010:143; Case C-379/09, *Maurits Casteels v. British Airways*, ECLI:EU:C:2011:131; Case C-172/11, *Georges Erny v. Daimler*, ECLI:EU:C:2012:399.

48 Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101; Case 251/83, *Eberhard Haug-Adrion v. Frankfurter Versicherungs-AG*, ECLI:EU:C:1984:397; Case C-309/99, *Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98; Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772.

49 Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115; Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101; Case 251/83, *Eberhard Haug-Adrion v. Frankfurter Versicherungs-AG*, ECLI:EU:C:1984:397; Joined Cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL and others*, ECLI:EU:C:2000:199; Case C-309/99, *Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809.

50 E.g. Drake 2006; Leczykiewicz 2010; Havu 2012, argue that no general regime of horizontal liability exists.

51 Case 33/76, *Rewe-Zentralfinanz and Rewe-Zentral v. Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188; Case 45/76, *Comet v. Produktschap voor Siergewassen*, ECLI:EU:C:1976:191.

national procedural autonomy is subject to two well-known limitations: the national rules (1) cannot be less favourable than those relating to rights flowing from national law (the principle of equivalence); and (2) must not render the exercise of Union rights practically impossible or excessively difficult (the principle of effectiveness).[52] Hence, the claim may be based on national law, but is modelled on the requirements of Union law, more particularly on the principles of equivalence and effectiveness.[53]

The leading cases *Defrenne*, *Bosman* and *Angonese* may serve as illustrative examples.[54] Gabrielle Defrenne claimed compensation from her employer on the basis of Belgian law. She argued that she had received unequal pay for equal work, contrary to the current Article 157 TFEU.[55] Jean-Marc Bosman argued that the transfer rules and nationality clauses adopted by professional football associations violated the free movement of workers and restricted competition within the internal market. He sought a declaration that the rules did not bind him and claimed compensation under Belgian law from his former club and from several football associations.[56] Roman Angonese argued that the language requirement imposed by a bank for admission to a recruitment competition infringed the free movement of workers. He brought legal proceedings in order to have the language requirement declared void under Italian law and have the bank compensate him for his losses.[57] In all these cases, Union law could successfully be invoked in support of claims based on national laws.

An infringement of primary Union law may also be pleaded as a defence. We have already considered the possibility to invoke competition law as a defence. This is just one of many examples. The defendant may argue that the rule on which the claimant relies must be interpreted in accordance with – or must be set aside because it is contrary to – the prohibition of any discrimination on grounds of nationality, laid down in Article 18 TFEU, protected as a fundamental right under Article 21 of the Charter and recognised as a general principle of Union law.[58] Likewise, the

52 An overview of the subsequent case law is provided by Dougan 2011, p. 408-421; Craig & De Búrca 2015, p. 225-251; Ebers 2016, p. 19-45.

53 Reich 2007, p. 708-709, who refers to the 'hybridisation of remedies'.

54 See, about the horizontal direct effect of the treaty provisions banning restrictions of the free movement of workers, establishment, and services, also Van den Bogaert 2002, p. 123-129; Van den Bogaert 2005, p. 23-29.

55 Case 43/75, *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, ECLI:EU:C:1976:56.

56 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463.

57 Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano*, ECLI:EU:C:2000:296.

58 With respect to discrimination on grounds of age (Case C-144/04, *Werner Mangold v. Rüdiger Helm*, ECLI:EU:C:2005:709, at 78; Case C-555/07, *Kücükdeveci v. Swedex*, ECLI:EU:C:2010:21, at 56; Case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2, at 47) and discrimination on grounds of religion or belief (Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung*, ECLI:EU:C:2018:257, at 76; Case C-68/17, *IR v. JQ*, ECLI:EU:C:2018:696, at 69).

arguments put forward by the claimant may be scrutinised on the basis of treaty provisions prohibiting discrimination on specific grounds, such as unequal treatment of male and female employees,[59] or on the basis of the free movement of workers, the freedom of establishment, or the freedom to provide services.[60]

Consider the case of football club Olympique Lyonnais against football player Olivier Bernard and his new club Newcastle United. Under the *Charte du Football Professionnel*, a collective agreement for the sector, Olympique Lyonnais was entitled to have Bernard sign a contract as a professional football player after his training programme had ended. Bernard did not accept the offer and signed a contract with Newcastle United. Olympique Lyonnais then claimed damages on the basis of the French *Code du travail* because Bernard failed to comply with his obligations under the *Charte du Football Professionnel*. Bernard and his new employer replied that this outcome would violate the free movement of workers. Olympique Lyonnais responded that the restriction of the right of free movement was justified because it furthered the recruitment and training of young players. At the end of the day, the Court of Justice sided with Bernard. His defence enlivened: the scheme of compensation under the *Code du travail* went beyond what is necessary to attain the stated objective.[61]

Not only does this judgment highlight the importance of so-called Euro-defences,[62] it also shows that if a violation of primary Union law has been pleaded – either by the claimant or by the defendant – the other party may use one or more tools from the same box. He may argue that verdict must be given in his favour because his counterpart has invoked Union law for abusive or fraudulent ends.[63] Depending on the basis of the claim, moreover, other defences may be available too. If the claimant pleads a case of indirect discrimination, for instance, the defendant may reply that the unequal treatment served a legitimate objective, and that the means chosen were necessary and appropriate for attaining this objective.[64] If the claimant

59 Case 43/75, *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, ECLI:EU:C:1976:56.

60 Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 33, with references to earlier case law.

61 Case C-325/08, *Olympique Lyonnais v. Olivier Bernard and Newcastle United*, ECLI:EU:C:2010:143. See, about this case, also Van den Bogaert 2010, p. 265-272.

62 This term is used by common lawyers, see e.g. Gormley 1986, p. 292; Hall 1991, p. 334-338; Jarvis 1995, p. 452 and 464; Howard 2003, p. 36 and 40; Odudu 2013, p. 395-415; Leczykiewicz & Weatherill 2013, p. 4; Warner 2013, p. 532-538.

63 The prohibition of abusive practices is a general principle of Union law, as the Court confirmed in Case C-251/16, *Edward Cussens, John Jennings, Vincent Kingston v. T.G. Brosnan*, ECLI:EU:C:2017:881, at 27-44; Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1* (C-115/16), *X Denmark A/S* (C-118/16), *C Danmark I* (C-119/16), *Z Denmark ApS* (C-299/16) *v. Skatteministeriet*, ECLI:EU:C:2019:134, at 96-101; Joined Cases C-116/16 and C-117/16, *Skatteministeriet v. T Danmark* (C-116/16), *Y Denmark Aps* (C-117/16), ECLI:EU:C:2019:135, at 70-75, with many references to earlier case law.

64 Ellis & Watson 2012, p. 169-174.

alleges a breach of Article 101 TFEU, the defendant may argue that the anti-competitive agreement is not prohibited because it satisfies the conditions of a block exemption regulation adopted by the European Commission.[65] If the claimant alleges a restriction of free movement, the defendant may respond that the restriction served a legitimate objective, such as public policy, public security or public health,[66] the protection of fundamental rights,[67] or some other objective of 'general interest',[68] and that the means chosen were necessary and appropriate for attaining this objective. Thus, it is clear that primary Union law provides individuals with a variety of defences, each with its own characteristic features.

4.4 Secondary Union law: claims, powers, defences

We will find many more examples if we examine the measures adopted by the Union legislature. Since the 1980s, a range of directives regulating private relationships has been introduced. Their overall objective is to ensure that consumers and businesses have better access to the internal market, which must result in more cross-border transactions. For this reason, most directives regulate contracts in general, and consumer contracts in particular. In recent years, the use of regulations has gained in popularity, especially in the fields of transport, consumer protection, and judicial cooperation in civil matters.[69] The question is whether these directives and regulations contain rules that are comparable to the rules we have examined in the previous chapters. Do they provide – or instruct the Member States to provide – individuals with *claims*, *powers*, and *defences*?

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65 This is settled case law: Case 10/86, *VAG France v. Établissements Magne*, ECLI:EU:C:1986:502, at 12; Case C-234/89, *Stergios Delimitis v. Henninger Bräu*, ECLI:EU:C:1991:91, at 41; Case C-226/94, *Grand Garage Albigeois and others v. Garage Massol*, ECLI:EU:C:1996:55, at 15; Case C-309/94, *Nissan and others v. Jean-Luc Dupasquier and others*, ECLI:EU:C:1996:57, at 15; Case C-230/96, *Cabour and Nord Distribution Automobile v. Arnor*, ECLI:EU:C:1998:181, at 47.

66 See, with regard to the free movement of workers, explicitly Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 86; Case C-350/96, *Clean Car Autoservice GmbH v. Landeshauptmann von Wien*, ECLI:EU:C:1998:205, at 24. The interpretation of these exceptions may differ, depending on the fundamental freedom at issue.

67 Such as the right to take collective action for the protection of workers: Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 77; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 103.

68 Such as the recruitment and training of young players (Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 106; Case C-325/08, *Olympique Lyonnais v. Olivier Bernard and Newcastle United*, ECLI:EU:C:2010:143, at 39).

69 De Graaff & Verheij 2017, p. 990-991; Ackermann 2018, p. 761; De Graaff & Verheij 2019, p. 277-281.

Indeed, many directives and regulations enable individuals to demand some performance from another person. The entitlement to payment in money is particularly important.[70] An early example is the right to claim compensation from a producer 'for damage caused by a defect in his product'.[71] Consider also the right of the commercial agent to claim 'commission' from his principal for transactions concluded through his agency, and to demand compensation upon termination of the agency contract.[72] For his part, the principal may demand repayment of the commission if the contract he concluded with the third party introduced by the agent has not been properly executed.[73] Consider also the entitlement to an 'allowance in lieu' of paid annual leave not taken upon termination of the employment relationship,[74] the right of a creditor to claim compensation from a commercial party for losses resulting from late payment,[75] the right of a payer to demand a 'refund' from his payment service provider,[76] and the right of a consumer to claim reimbursement after termination of a sales contract because of a lack of conformity.[77]

Additional examples can be found in the area of transport. Over the years, the Union legislature has introduced a comprehensive set of traveller and passenger rights. The set includes, first of all, a directive on package travel and linked travel arrangements. In accordance with this directive, the traveller is entitled to claim 'appropriate compensation' if the organiser

70 Cf. Wilman 2016, p. 896-909, who deals with a selection of legislative acts in the fields of public procurement, intellectual property, consumer protection, and competition law. Public procurement will not be discussed in this chapter, given the focus of this book on the relationships between private parties.

71 Art. 1, Council Directive 85/374/EEC on the liability for defective products.

72 Art. 6-8 and Art. 17 respectively, Council Directive of 18 December 1986 on self-employed commercial agents (86/653/EEC). Note that Art. 17 contains two compensatory mechanisms – 'indemnity' and 'compensation' – but leaves the choice between these two options to the Member States, as confirmed in Case C-338/14, *Quenon v. Citibank and Citilife*, ECLI:EU:C:2015:795, at 24.

73 Art. 11 (2) in conjunction with Art. 11 (1), Council Directive of 18 December 1986 on self-employed commercial agents (86/653/EEC), as interpreted in Case C-48/16, *ERGO v. Alžbeta Barlíková*, ECLI:EU:C:2017:377, at 44 and 48.

74 Art. 7 (2), Directive 2003/88/EC concerning certain aspects of the organisation of working time, as interpreted in Case C-619/16, *Sebastian W. Kreuziger v. Land Berlin*, ECLI:EU:C:2018:872, at 22; Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften v. Tetsuji Shimizu*, ECLI:EU:C:2018:874, at 23; Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v. Maria Elisabeth Bauer* (C-569/16) *and Volker Willmeroth v. Martina Broßonn* (C-570/16), ECLI:EU:C:2018:871, at 44.

75 Art. 3-4 and 6, Directive 2011/7/EU on combating late payment in commercial transactions.

76 Art. 73 and Art. 89, Directive (EU) 2015/2366 on payment services in the internal market.

77 Art. 16 (3), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods; Art. 16 (1), Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

fails to comply with the obligations under the package holiday contract.[78] In addition, a range of regulations has been introduced governing the rights of passengers travelling by air, by sea and inland waterway, and by bus and coach. On the basis of these regulations, carriers are obliged to pay compensation in the event of denied boarding, cancellation or delay,[79] in the event of death or injury of passengers,[80] and for lost or damaged wheelchairs.[81] In such circumstances, they may also be obliged to reimburse the passengers concerned.[82]

Illustrative examples can be found in the law of intellectual property too. The holders of a copyright or related right, for instance, may claim 'fair compensation' if their protected works have been reproduced without their permission.[83] In the near future, a similar right will be introduced in respect of press publishers whose publications have been used online by a commercial service provider,[84] and in respect of publishers in general if the works they have acquired from authors have been used.[85] For their part, authors

78 Art. 14 (2) and recital 34, Directive (EU) 2015/2302 on package travel and linked travel arrangements, and Case C-168/00, *Simone Leitner v. TUI Deutschland*, ECLI:EU:C:2002:163, at 19-24.

79 Art. 4-7, Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, as interpreted in Joined Cases C-402/07 and C-432/07, *Sturgeon v. Condor Flugdienst*, ECLI:EU:C:2009:716. The right to compensation in the event of delay is also laid down in Art. 15 of Regulation (EU) 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway, and in Art. 19 of Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport.

80 Art. 1 and Art. 3, Regulation (EC) No 889/2002 on air carrier liability in the event of accidents.

81 Art. 12, Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

82 Art. 8, in conjunction with Art. 4 (1), Art. 5 (1) (a), and Art. 6 (1) (iii), Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. Consider also Art. 16, Regulation (EC) No 1371/2007 on rail passengers' rights and obligations; Art. 18, Regulation (EC) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway; Art. 10 (3) and 19, Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport; Art. 12 (2)-(3), Directive (EU) 2015/2302 on package travel and linked travel arrangements.

83 Following Art. 5 (2) (a), (b) and (e), Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Member States may only limit the right to authorise or prohibit any reproduction in any form if they ensure that rightholders receive 'fair compensation'. This is an autonomous concept of EU law which must be interpreted uniformly, according to Case C-467/08, *Padawan v. SGAE*, ECLI:EU:C:2010:620, at 29-37.

84 Art. 15 (3), in conjunction with Art. 15 (1), Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (to be implemented by 7 June 2021).

85 Art. 16, Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (to be implemented by 7 June 2021). Note that Member States 'may provide' for such a right.

and performers will be entitled to receive 'appropriate and proportionate remuneration' if they license or transfer their intellectual property rights to another party.[86] They also have the right to obtain an 'equitable remuneration' from a phonogram or film producer in exchange for the private lending of their works.[87] Likewise, trade mark holders may claim 'reasonable compensation' from third parties who use an identical sign during the period between the publication of the initial trade mark application and the publication of the actual registration of the trade mark itself.[88] Finally, it is important to observe that the Union legislature has determined that 'any infringer' of an intellectual property right shall be liable 'to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement'.[89] In this context, both economic losses and non-economic losses must be fully compensated.[90]

This technique has now become fairly popular. The Union legislature regularly goes beyond instructing the Member States to provide for 'appropriate remedies',[91] to put in place 'adequate and effective means',[92] or to introduce 'effective, proportionate and dissuasive sanctions'[93] to combat infringements of, and enforce compliance with, the relevant Union laws. By now, a significant number of directives and regulations contains

86 Art. 18 (1), Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (to be implemented by 7 June 2021). Note that authors of works incorporated in a press publication may also receive 'an appropriate share of the revenues that press publishers receive' for the online use of these publications, according to Art. 15 (5) of the same directive.

87 Art. 5 (1), Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property. It follows from Case C-271/10, *VEWA v. Belgische Staat*, ECLI:EU:C:2011:442, at 30, that this concept must be given an autonomous and uniform interpretation.

88 Art. 11 (2), Regulation (EU) 2017/1001 on the European Union trade mark. This concept must also be given an autonomous and uniform interpretation, according to Case C-280/15, *Irina Nikolajeva v. Multi Protect*, ECLI:EU:C:2016:467, at 45.

89 Art. 13 (1), in conjunction with Art. 2 (1), Directive 2004/48/EC on the enforcement of intellectual property rights.

90 Art. 13 (1), Directive 2004/48/EC on the enforcement of intellectual property rights, as interpreted in Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 15-27.

91 This requirement can be found in e.g. Art. 12, Directive 96/9/EC on the legal protection of databases; Art. 7 (1), Directive 2009/24/EC on the legal protection of computer programs.

92 Art. 11 (1), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

93 This requirement can be found in e.g. Art. 15, Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Art. 17, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; Art. 13, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

detailed liability rules which determine precisely the conditions under which compensation must be paid for losses resulting from infringements of the requirements imposed by those directives and regulations.[94] Recent examples include the right to claim compensation from a controller or processor for the 'material or non-material damage' suffered as a result of an infringement of the General Data Protection Regulation,[95] the right to claim 'damages appropriate to the actual prejudice suffered as a result of the unlawful acquisition, use or disclosure' of a trade secret,[96] the right to claim compensation from the authorised representative of a manufacturer for losses resulting from defective medical devices,[97] and the right to claim compensation from members of the administrative or management bodies of the company being acquired or divided.[98]

It may be possible, moreover, to demand another form of performance than monetary payment. In the event of non-conformity, for instance, the trader is under a duty to repair or replace the goods,[99] or to bring into conformity the digital content or services supplied to the consumer.[100] The holder of an intellectual property right may demand recall, removal or destruction of goods created and manufactured in violation of his intellectual property right.[101] Likewise, the holder of a trade secret may demand recall, removal or destruction of goods which significantly benefit from trade secrets unlawfully acquired, used or disclosed.[102] Additional examples can be found in the area of passenger rights. The air passenger, for instance, may demand an alternative flight and certain types of care from

94 Art. 94, Council Regulation (EC) 2100/94 on Community plant variety rights; Art. 35a, Regulation (EU) No 462/2013 on credit rating agencies; Art. 13, Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters; Art. 13 (1), Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation); Art. 36 (10), Regulation (EU) 2015/848 on insolvency proceedings.

95 Art. 82, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

96 Art. 14, Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

97 Art. 11 (5), Regulation (EU) 2017/745 on medical devices.

98 Art. 106-107 and 152, Directive (EU) 2017/1132 relating to certain aspects of company law.

99 Art. 3, Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Art. 13 (2), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.

100 Art. 14 (1)-(3), Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

101 Art. 10, Directive 2004/48/EC on the enforcement of intellectual property rights.

102 Art. 12, Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

the carrier.[103] The General Data Protection Regulation enables a natural person to demand access to and rectification, erasure and transfer of his personal data.[104] Similarly, a payment services user may obtain rectification of an unauthorised or incorrectly executed payment transaction.[105] Finally, an important element in several directives and regulations is that they require certain information to be provided in writing, either as a rule,[106] or upon request.[107]

Several directives and regulations also enable individuals to create, modify or extinguish a legal position or relationship. Most examples can be found within the law of contract.[108] The power to withdraw from a contract is a case in point. It is a key element in directives governing package travel contracts,[109] contracts for financial services,[110] credit agreements,[111] timeshare, long-term holiday product, resale or exchange contracts,[112] life insurance contracts,[113] distance or off-premises contracts,[114] and contracts

103 Art. 8, in conjunction with Art. 4 (1), Art. 5 (1) (a), and Art. 6 (1) (iii), Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. Consider also Art. 16, Regulation (EC) No 1371/2007 on rail passengers' rights and obligations; Art. 18, Regulation (EC) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway; Art. 10 (3) and 19, Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport; Art. 12 (2)-(3), Directive (EU) 2015/2302 on package travel and linked travel arrangements.

104 Art. 15-20, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

105 Art. 71 (1), Directive (EU) 2015/2366 on payment services in the internal market.

106 Art. 14, Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; Art. 14 (11), Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property; Art. 5-7, Directive (EU) 2015/2302 on package travel and linked travel arrangements; Art. 4-7, Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union.

107 Art. 13 (1), Directive 86/653/EEC on self-employed commercial agents; Art. 18 (2), Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union.

108 But consider the power to have a court declare a merger or division void, provided for in Art. 108 and 153, Directive (EU) 2017/1132 relating to certain aspects of company law.

109 Art. 12 (5), Directive (EU) 2015/2302 on package travel and linked travel arrangements.

110 Art. 6, Directive 2002/65/EC concerning the distance marketing of consumer financial services.

111 Art. 14, Directive 2008/48/EC on credit agreements for consumers. See also Art. 14 (6) and (11), Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property, but it must be observed that some discretion is awarded to the Member States in this regard.

112 Art. 6, Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

113 Art. 186, Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

114 Art. 9, Directive 2011/83/EU on consumer rights.

for the provision of telephone services.[115] Several harmonising measures provide for other possibilities to modify or extinguish the contractual obligations between the parties. Provided that the necessary conditions are fulfilled, the contracting party may elect to terminate an agency contract or payment services contract,[116] to terminate a package travel contract or to reduce the price,[117] to terminate a sale agreement in the event of non-conformity or to reduce the price,[118] to 'discharge' the obligations under a credit agreement,[119] and to terminate a contract because the terms and conditions will change.[120] It may also be possible to challenge individual terms of a contract. A prime example is the rule 'that unfair terms used in a contract concluded with a consumer by a seller or supplier shall (…) not be binding on the consumer'.[121]

Many directives and regulations also provide individuals with defences. A striking example is the so-called *passing-on* defence against compensation for losses resulting from an infringement of competition law. In this case, the infringer argues that the injured party has passed its losses on to its own purchasers, so that there is no harm that needs to be compensated.[122] Another possibility for the defendant may be to plead that the claim is 'unenforceable' because it is based on contractual provisions contrary to Union law.[123] Sometimes, defendants may rely upon a justification ground. Producers will, for instance, not be liable if they complied

115 Art. 20 (4), Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

116 Provided in respect of agency contracts concluded for an indefinite period under Art. 15 of Directive 86/653/EEC on self-employed commercial agents, and in respect of a payment services contract under Art. 55 of Directive (EU) 2015/2366 on payment services in the internal market.

117 Art. 12 (1)-(4) and Art. 10 (4), Art. 11 (4), Art. 13 (5)-(6) and Art. 14 respectively, Directive (EU) 2015/2302 on package travel and linked travel arrangements.

118 Subject to the conditions under Art. 3 (5)-(6) of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Art. 13 (4)-(5), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods; Art. 14 (4)-(6), Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

119 Art. 16, Directive 2008/48/EC on credit agreements for consumers; Art. 25, Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property.

120 Art. 3 (2), Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

121 Art. 6 (1), Council Directive 93/13/EEC on unfair terms in consumer contracts.

122 Art. 13, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

123 E.g. Art. 7 (1), Directive 2011/7/EU on combating late payment in commercial transactions; Art. 7 (1), Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market; Art. 7 (1), Directive (EU) on copyright and related rights in the Digital Single Market (to be implemented by 7 June 2021).

with mandatory laws,[124] carriers will not be liable in the event of extraordinary circumstances,[125] and providers will not be liable if they have duly informed their customers about the limitations related to the use of their trust services.[126] Defendants may also be able to rely upon exemptions, for instance if they can prove that they could not have discovered the existence of the defect, given the state of scientifical and technical knowledge at the time when the product was put into circulation,[127] that they were not in any way responsible for the event giving rise to the damage,[128] that they did not have knowledge of or control over this event,[129] or that the event was in fact caused by the claimant himself.[130] Hence, it is clear that directives and regulations may not only provide an individual with one or more claims or powers, but also with one or more defences.

4.5 How to solve questions of interpretation in a multi-level legal order?

On the basis of the previous sections, we may conclude that current Union law contains many rules that are comparable to the rules that play a central role in the national systems of private law. These rules have not been collected and systemised in a comprehensive codification. Quite the opposite is the case. The rules are scattered over multiple instruments and sources of Union law. They are supplemented by rules rooted in national legislation, in case law, and in contractual agreements. As a result, multiple

124 Art. 7 (d), Council Directive 85/374/EEC on the liability for defective products.

125 Art. 5 (3), Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; Art. 20 (3) and (4), Regulation 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway.

126 Art. 13 (2), Regulation 910/2014 on electronic identification and trust services for electronic transactions in the internal market. Similar rules can be found in Art. 12-15, Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce; Art. 5 (1)(c), Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; Art. 17 (4), Regulation 1371/2007 on rail passengers' rights and obligations; Art. 20 (2), Regulation 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway; Art. 17 (4), Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (to be implemented by 7 June 2021).

127 Art. 7 (e), Council Directive 85/374/EEC on the liability for defective products.

128 Art. 82 (3), Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

129 Art. 12 et seq., Directive 2000/31/EC on certain legal aspects of information society services, called 'defences in law' by the Court in Case C-291/13, *Sotiris Papasavvas v. O Fileleftheros Dimosia Etairia and Others*, ECLI:EU:C:2014:2209, at 51.

130 Art. 20 (2), Regulation 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway.

claims, powers, and defences may, on the face of it, be available in a given case – each with their own characteristic features and their own constitutional background.

How should we determine the relationship between these rules? Can we proceed from the assumption that the objectives of each rule, regardless of its legal source, should be realised to the greatest possible extent? Several writers have warned against adopting such an approach. Adopting a Kelsen view,[131] they underline that the formal hierarchy of legal sources plays an important role in the context of Union law.[132] And it is true that, within the Union legal order, the constituent Treaties and the Charter sit at the top of the pyramid,[133] that general principles come second, and that legislative acts come last.[134] Moreover, the Court of Justice has consistently held that any of these norms takes precedence over any norm of national law.[135] This principle of primacy is an essential feature of the European legal order.[136]

However, the existence of a formal hierarchy does not imply that a higher norm automatically trumps the application of rules lower down the hierarchy. Consider the situation that a national measure falls within the substantive scope of one or more treaty provisions and one or more harmonising measures. The Court of Justice has stressed time and again that a mere overlap is not sufficient to exclude the applicability of either primary or secondary law. By contrast, the basic assumption is that the provisions of primary and secondary law apply concurrently and may both be used to assess the national measure at issue. An exception must, however, be made when it has been the intention of the Union legislature to regulate the issue exhaustively. Whether this is the case, depends on the interpretation of the relevant texts. Only if the answer is affirmative does Union law exclude the applicability of primary Union law.[137]

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131 See section 1.2.

132 Gruber 2004, p. 230; Bakels 2009a, p. 338; Sieburgh 2009; Hartkamp 2011, p. 158.

133 Art. 1 and 6 (1) TEU.

134 Craig & De Búrca 2015, p. 111-123.

135 Case 6/64, *Flaminio Costa v. ENEL*, ECLI:EU:C:1964:66; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, ECLI:EU:C:1978:49; Opinion 1/09 of the Court, [2011] ECR I-1137.

136 Opinion 1/91 of the Court, [1991] ECR I6079, at 21; Opinion 1/09 of the Court, [2011] ECR I-1137, at 65; Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, ECLI:EU:C:2013:107, at 59.

137 Case 5/77, *Carlo Tedeschi v. Denkavit Commerciale*, ECLI:EU:C:1977:144, at 33-35; Case C-37/92, *José Vanacker v. André Lesage*, ECLI:EU:C:1993:836, at 9; Case C-324/99, *Daimler-Chrysler v. Land Baden-Württemberg*, ECLI:EU:C:2001:682, at 32; Case C-322/01, *Deutscher Apothekerverband*, ECLI:EU:C:2003:664, at 64; Case C-205/07, *Lodewijk Gysbrechts v. Santurel Inter BVBA*, ECLI:EU:C:2008:730, at 33; Case C-421/12, *Commission v. Belgium*, ECLI:EU:C:2014:2064, at 63; Case C-95/14, *UNIC and Uni.co.pel*, ECLI:EU:C:2015:492, at 33; Case C-198/14, *Valev Visnapuu v. Kihlakunnansyyttäjä*, ECLI:EU:C:2015:751, at 40; Case C-6/16, *Eqiom and Enka v. Ministre des Finances et des Comptes publics*, ECLI:EU:C:2017:641, at 15; Case C-14/16, *Euro Park Service v. Ministre des Finances et des Comptes publics*, ECLI:EU:C:2017:177, at 19.

Consider also the overlap of national laws and Union laws. In this context, it is the principle of primacy that safeguards the consistency and uniformity in the interpretation and application of Union law. The Court has made it very clear that these objectives cannot be achieved if the validity of Union law can be challenged by relying upon national laws, regardless of their legal rank or constitutional importance.[138] This does not, however, mean that Union law necessarily excludes the applicability of national law. The principle of primacy is essentially a rule of *conflict*. As De Witte writes, primacy only enters the picture 'when there is an actual conflict between two norms that are both capable of being applied to the facts of a case'.[139] As Lenaerts and Corthout observe, moreover, 'the exclusion only applies to the extent of the conflict'.[140] The pivotal question, therefore, is whether a conflict between national law and Union law actually exists.

The question whether a legislative instrument exhaustively regulates a certain issue, and the question whether a conflict exists between Union law and the applicable national law, are questions of interpretation. Such questions cannot be solved by using the Kelsen model, however useful this model may be to understand the vertical structure of the Union legal order and its primacy over national laws. Kelsen himself admitted that there may be several possibilities for implementing a higher norm, but he did not provide tools to make the 'correct' choice and merely submitted that each lower norm which stays within the frame set by the higher norm is 'valid'.[141]

It does not come as a surprise, therefore, that constitutional scholars have emphasised the importance of searching for shared substantive principles and commonly negotiated methods of interpretation. It is in this context that the principle that each applicable rule ought to have its intended legal effect surfaces again. Kumm, for instance, argues that courts should determine the relationship between overlapping legal orders 'on the basis of the best interpretation of the principles underlying them both'.[142] In a similar spirit, Lierman calls for a 'convergence of methods of interpretation, of legal instruments and legal principles beyond the limits of separate branches of law and legal orders'.[143] Consider also the position of Davies, who argues that the courts must interpret the texts in a way that fits them together, proceeding from the assumption that both Union law and national law apply.[144]

138 Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.
139 De Witte 2011, p. 342.
140 Lenaerts & Corthaut 2006, p. 291.
141 Kelsen 1990, p. 129-130.
142 Kumm 2005, p. 286.
143 Lierman 2014, p. 629.
144 Davies 2018a.

Such statements indicate that the principle that the objectives of each rule should be realised to the greatest possible extent is not peculiar to the national systems of private law. This is not to suggest that the primacy of Union law may be undermined by reference to national laws and interpretations, nor to claim that private relationships will generally give cause for conflicts of constitutional importance.[145] Even if one accepts, like this book does, that the precedence of Union law is ultimately based on and limited by the founding Treaties of the Union, and not based on and limited by the national constitutions – a claim which has, in fact, been rejected by a great number of supreme and constitutional courts[146] – something else might yet be needed, something that the principle of primacy does not provide. This principle does tell us which law must have priority in the event of conflicts, but does not tell us how we should determine whether a conflict actually exists. It is against this backdrop that it appears to be necessary to examine in more detail how Union law itself answers such questions of interpretation.

4.6 Conclusion

As indicated, this book explores the potential of the scheme of analysis used within the national systems of private law to understand situations of overlap and conflict in the context of Union law. Before embarking upon a more detailed analysis of this question, it was necessary to take a step back and substantiate two underlying propositions.

Firstly, this chapter has demonstrated that Union law contains many rules that are comparable to the rules we have examined in the previous chapters. In fact, we may conclude that the 'private enforcement' of Union law is increasingly governed by Union law itself. As far as primary Union law is concerned, this development is entirely attributable to the Court of Justice of the European Union. In a long line of cases, the Court has established that certain individuals are under a duty towards other individuals to comply with the treaty and Charter provisions prohibiting discrimination, the treaty provisions banning restrictions of the free movement of persons and services, and the Charter provisions regarding the right to paid annual leave. Importantly, the Court of Justice has worked out several claims in great detail: the claim for compensation for losses resulting from infringe-

145 Although it must be noted that the clash between the Court of Justice and the Supreme Court of Denmark concerned a dispute between two private parties about a relatively small claim. See Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S, v. Estate of Karsten Eigil Rasmussen*, ECLI:EU:C:2016:278, and its aftermath, discussed by Madsen, Olsen & Šadl 2017.

146 An overview of the case law can be found in Oppenheimer 1994; Oppenheimer 2003; McDonnell 2018, p. 421-427.

ments of EU competition law, the claim for an allowance in lieu of annual leave not taken upon termination of the employment relationship, and the claim for compensation for losses resulting from unequal treatment.

As far as secondary Union law is concerned, this chapter has shown that the Union legislature regularly goes beyond instructing the Member States to provide for adequate and effective means for enforcing Union law. Indeed, many directives and regulations enable individuals to claim some form of performance, such as specific performance or monetary compensation, from another individual. In addition, several directives and regulations enable individuals to create, modify or extinguish a legal position or relationship. The power of the consumer to withdraw from a contract within a prescribed period of time is particularly important. Finally, the Union legislature has provided individuals with a range of defences, including grounds of exemption and justification.

It is not uncommon for a single set of facts to fall within the scope of multiple rules, rooted in primary and secondary Union law, nor is it uncommon that national laws may provide additional protection. The question to consider is whether one rule affects the scope of application of another rule. This chapter has submitted that, in such situations, we should avoid jumping to the conclusion that rules with a higher status automatically override rules lower down the hierarchy. The question whether a legislative instrument exhaustively regulates a certain issue, and the question whether a conflict exists between Union law and the applicable national law, are questions of interpretation. Such questions cannot be answered on the basis of the formal relationship between the rules alone. Regard must be had to their substance.

It is against this background that it appears to be worthwile to examine in more detail how Union law deals with questions of concurrence. What does the Union legislature say? How does the Court of Justice of the European Union respond? Are their approaches comparable to the solutions offered in the national systems of private law? These questions will be dealt with in the next two chapters; first in the context of primary Union law and then in the context of secondary Union law.

5 Concurrence in Primary Union Law

5.1 Introduction

The body of primary Union law consists of the founding Treaties and the Charter, and includes the general principles read into these texts by the Court of Justice of the European Union.[1] A substantial number of these norms may be relied upon in relationships between private individuals. As the previous chapter has demonstrated, private conduct may, under certain circumstances, be assessed against the general prohibition of discrimination on grounds of nationality, against certain free movement provisions, and against competition rules.[2] These rules each have their own field of application. They are not, however, wholly self-contained. On the face of it, a single set of facts might fall within the scope of several rules, resulting in the availability of multiple claims and defences.

Of course, not every set of facts will necessarily be governed by multiple treaty provisions. It is for the law of non-discrimination to determine whether there is an unlawful difference in treatment between persons with different nationalities, for the law of free movement to determine whether access to the market is restricted, and for the law of competition to determine whether there is a cartel or an abuse of a dominant position. Much can be said about the construction of each of these concepts, as to which this chapter seeks to remain neutral. Instead, this chapter examines the question of whether, in principle, these treaty provisions might apply concurrently to the same set of facts. May the interested party rely upon the rule of his choice, notwithstanding the applicability of another treaty provision? Or does the applicability of one treaty provision necessarily exclude the applicability of the other treaty provision?

This chapter examines how Union law answers these questions. It focuses on the three sets of treaty provisions that are most relevant when assessing legal relationships between private parties: the general prohibition of discrimination on grounds of nationality, the provisions concerning the free movement of persons and services, and the provisions pertaining to competition law. Within these broad categories, three examples will be singled out. Firstly, the chapter will analyse the relationship between Article 18 TFEU, which prohibits any discrimination on grounds of nationality, on the one hand, and the treaty provisions pertaining to the free movement of

1 De Witte & Smulders 2018, p. 193-198.
2 *Supra* section 4.3.

persons and services on the other hand (section 5.2). Secondly, the chapter will investigate the relationship between Article 101 TFEU, which deals with collusion between undertakings, and Article 102 TFEU, which deals with the market conduct of dominant undertakings (section 5.3). Thirdly, the chapter will examine the relationship between these free movement rules and the competition rules laid down in Articles 101 and 102 TFEU (section 5.4).

With the exception of Article 18 TFEU, these treaty provisions do not make any comment about their mutual relationship.[3] Even Article 18 TFEU merely mentions that it is 'without prejudice to any special provisions' contained in the Treaties. It is the question what this statement actually means. The case law is of crucial importance if we want to know the answers to such questions. For this reason, this chapter devotes much attention to judgments delivered by the Court of Justice. The reader should be aware that a number of these judgments concern 'vertical' relationships between a public body and one or more individuals, including judgments delivered in first instance proceedings before the General Court and in appeal proceedings before the Court of Justice.[4] These judgments are nonetheless discussed because they are important to find the appropriate answers in 'horizontal' relationships between individuals.

Before we continue with our enquiry, it should be explained why this chapter does not examine the relationship between the various free movement provisions, considering that the chapter does examine the relationship between Articles 101 and 102 TFEU. It will be recalled that only some free movement provisions, governing persons and services, may be relied upon in order to assess certain conduct of private parties, bringing them within the scope of this book.[5] But it appears that the question as to which of these free movement provision is applicable to the case at hand is rather a question of qualification than a question of concurrence. Unlike the free movement of workers, which concerns employment activities,[6] the freedom of establishment and the freedom to provide services concern self-employed activities.[7] The essential difference between the latter two freedoms, moreover, is that Article 49 TFEU governs activities performed on a 'stable and

3 This chapter refers to the provisions as they are currently numbered in the Treaties.

4 Formerly known as the Court of First Instance, the General Court hears actions brought by individuals and Member States against acts or omissions of the institutions, bodies, offices or agencies of the EU (Art. 256 TFEU). Its decisions may be subject to an appeal before the Court of Justice. This book refers to the General Court when discussing cases decided by the Court of First Instance.

5 See section 4.3.

6 Case C-268/99, *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, ECLI:EU:C:2001:616, at 34. See further, on the definition of 'worker' within the meaning of Art. 45 TFEU, Craig & De Búrca 2015, p. 748-758.

7 Craig & De Búrca 2015, p. 796.

continuous basis',[8] whereas Article 56 TFEU governs activities performed 'on a temporary basis'.[9] This means that the provisions will not be applicable concurrently to a single set of facts. For this reason, their relationship will not be considered in this chapter.

5.2 Article 18 TFEU and free movement law

5.2.1 Introduction

The natural starting point for any enquiry into the relationship between overlapping rules of primary Union law is the principle of equality or non-discrimination. Article 2 of the Treaty on European Union solemnly declares that this principle is one of the core values, if not the core value, upon which the Union is founded:

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

The principle of equality or non-discrimination finds its expression in a wide range of separate treaty and Charter provisions,[10] some of which may be applicable, as we have seen, to private conduct.[11] It is not uncommon for a single set of facts to fall within the scope of application of multiple non-discrimination rules. In fact, as soon as one non-discrimination rule is applicable, there is a good chance that another non-discrimination rule is applicable too, given the substantial number of discriminatory grounds bricked into the building of primary Union law.

To begin with, Article 157 TFEU deals with the right of male and female workers to equal pay for equal work of equal value. Articles 18 of the TFEU and 21 (2) of the Charter focus on discrimination on grounds of nationality. This form of discrimination is also prohibited by provisions pertaining to the free movement of citizens[12] and workers,[13] to the freedom of establishment,[14] and to the freedom to provide services.[15] In addition, the

8 Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, at 25.
9 Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, at 26.
10 See also Muir 2019, p. 817-839.
11 See *supra* section 4.3.
12 Art. 21 TFEU.
13 Art. 45 et seq. TFEU.
14 Art. 49 et seq. TFEU.
15 Art. 56 et seq. TFEU.

free movement rights of citizens of the Union are protected by the Charter.[16] Underpinning all these rules is the general principle of equal treatment or non-discrimination conceived and fostered by the Union Courts as part of the unwritten body of primary Union law.[17] This general principle may, in turn, be subdivided into more specific principles of equality related to grounds such as sex, age, religion or belief.[18] These unwritten principles have also made their way to Article 21 (1) of the Charter, which forbids *any* discrimination on *any* ground, and lists several examples.[19]

This subsection will not consider all the possible scenarios of concurrence between these non-discrimination rules and principles. Many scenarios are simply not that thrilling. No particular problems are, for instance, caused by the concurrence of the general and specific principles of equality and the identical Charter rights. Since *Åkerberg Fransson*, we know that both sources of Union law have the same field of application: they apply as soon as the facts come 'within the scope of European Union law' on account of another treaty provision, regulation or directive.[20] And if the facts do fall within the scope of a non-discrimination rule contained in the Treaties, we may safely assume that the interpretation and application of the general and specific principles of equality and the identical written Charter rights will not lead to different outcomes. It is quite clear, for instance, that Article 21 (2) of the Charter must be interpreted and applied in accordance with Article 18 TFEU.[21]

For these reasons, this section will not pay attention to the general principles and the Charter, but will only examine the corresponding treaty provisions. Our attention will be fixed on the relationship between the general prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU on the one hand, and the treaty provisions governing the free movement of workers (Art. 45 TFEU), the freedom of establishment (Art. 49 TFEU), and the freedom to provide and receive services (Art. 56 TFEU) on the other hand. It is often assumed that Article 18 TFEU applies only to situations which are not governed by these free movement provi-

16 Article 15 (2) of the Charter.

17 Case C-144/04, *Werner Mangold v. Rüdiger Helm*, ECLI:EU:C:2005:709, at 78; Case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2, at 47; Case C-555/07, *Kücükdeveci v. Swedex*, ECLI:EU:C:2010:21, at 56; Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung*, ECLI:EU:C:2018:257, at 76-79.

18 As explained by Tobler 2013, p. 449-454.

19 Sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age and sexual orientation.

20 Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, at 16-23, as explained by Dougan 2015, p. 1205-1207.

21 As emphasised in Art. 52 (2) of the Charter, explained in the Explanations relating to the Charter of Fundamental Rights, and confirmed by the Court in Case T-452/15, *Andrei Petrov and Others v. European Parliament*, ECLI:EU:T:2017:822, at 39; Case T-618/15, *Udo Voigt v. European Parliament*, ECLI:EU:T:2017:821, at 80; Case C-703/17, *Krah v. Universität Wien*, ECLI:EU:C:2019:850, at 18.

sions. Baquero Cruz, for instance, submits that Article 18 TFEU 'steps back' in the presence of a more concrete free movement provision.[22] This section subjects this conclusion to closer scrutiny. When, if at all, do the free movement provisions affect the scope of application of Article 18 TFEU?

Firstly, a brief overview of the provisions and their relationship will be provided (subsection 5.2.2). The section then explains that the Court of Justice of the European Union has, gradually yet firmly, widened the scope of application of the free movement provisions (subsection 5.2.3), raising the question of whether the scope of Article 18 TFEU has been extended too. This question is worth revisiting now, in the light of the Grand Chamber judgment in the case *International Jet Management* (subsection 5.2.4). Having argued that this judgments demonstrates that the free movement provisions do not qualify as *leges speciales* in relation to Article 18 TFEU, the section considers the situation where the provisions do overlap. To what extent, if at all, should Article 18 TFEU be excluded (subsection 5.2.5)?

5.2.2 General and specific prohibitions of discrimination

As far as discrimination on grounds of nationality is concerned, Article 18 TFEU is the most general provision contained in the Treaties. It reads as follows:

> 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. (…)'[23]

This rule applies on its own terms to any situation in which a person holding the nationality of one of the Member States is treated differently – either directly or indirectly[24] – compared with persons holding the nationality of another Member State.[25] Two further limitations do apply. In order for Article 18 TFEU to be applicable, the situation must fall within 'the scope of application of the Treaties'. Moreover, the provision only applies to cross-

22 Baquero Cruz 1999, p. 613.

23 The second paragraph reads: 'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.'

24 This is settled case law, see e.g. Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost*, ECLI:EU:C:1974:13, at 11; Case C-29/95, *Eckehard Pastoors and Others*, ECLI:EU:C:1997:28, at 16; Case C-411/98, *Angelo Ferlini v. Centre Hospitalier de Luxembourg*, ECLI:EU:C:2000:530, at 57; Case C-224/00, *Commission v. Italy*, ECLI:EU:C:2002:185, at 15; Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 64. On the development of indirect discrimination through case law: Tobler 2005, p. 101-278.

25 With regard to companies, the place of the corporate seat is decisive, see Barnard 2016, p. 208, and Case C-330/91, *The Queen v. Inland Revenue Commissioners* ex parte*: Commerzbank AG*, ECLI:EU:C:1993:303 and Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, ECLI:EU:C:2008:723, at 106-110.

border situations and not to situations of a 'purely internal' nature.[26] The same limitations apply in the context of the free movement of workers, the freedom of establishment, and the freedom to provide and receive services. Only if the persons concerned have sought to exercise their rights of free movement does the case fall within the scope of application of these treaty provisions.[27]

On one point, the free movement rights are more narrow in scope. Whereas Article 18 TFEU, in principle, covers all activities falling within the scope of application of the Treaties, the free movement provisions under consideration here only govern 'economic' activities. Article 45 TFEU, for instance, applies to workers, that is to persons performing services 'for and under the direction of another person' in return for 'remuneration'.[28] Consider also Article 49 TFEU, which applies to economic activities performed by self-employed persons and companies 'in return for remuneration',[29] and Article 57 TFEU, which makes clear that 'services' must normally be provided 'for remuneration' in order to fall within the scope of Article 56 TFEU.[30]

As far as their substance is concerned, the free movement provisions seem to contain the same prohibition as the one laid down in Article 18 TFEU. Article 45 (2) TFEU even uses the same terms. It explicitly prohibits 'any discrimination based on nationality between workers of the Member States'. The language of Articles 49 and 56 TFEU is different. These provisions prohibit 'restrictions' on the freedom of establishment and the freedom to provide services respectively. But in both cases, the nationality of the person in question remains the distinguishing criterion: Article 49 TFEU protects 'nationals' of a Member State wishing to establish themselves in the territory of another Member State, and Article 56 TFEU protects 'nationals' of a Member State wishing to provide services to persons established in another Member State.[31] Indeed, the general prohibition of discrimination on grounds of nationality is considered to form the conceptual foundation

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26 As explained by Van der Mei 2011, p. 63-64. It must be noted that the Court has somewhat loosened the interpretation of this condition under the impact of the provisions on citizenship of the Union (see e.g. Craig & De Búrca 2015, p. 865-871, with references to case law).

27 Barnard 2016, p. 209-211. See e.g. Joined Cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen*, ECLI:EU:C:1997:285, at 16; Case C-212/06, *Government of the French Community and Walloon Government v. Flemish Government*, ECLI:EU:C:2008:178, at 33-39; Case C-84/11, *Marja-Liisa Susisalo, Olli Tuomaala, Merja Ritala*, ECLI:EU:C:2012:374, at 18, with references to earlier judgments.

28 Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, ECLI:EU:C:1986:284, at 17.

29 Case C-268/99, *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, ECLI:EU:C:2001:616, at 71, on the interpretation of the corresponding provisions contained in the Association Agreements between the Communities and Poland and the Czech Republic).

30 The concept of 'economic activity' is examined in detail by Odudu 2009.

31 Consider also Art. 61 TFEU, which mentions 'restrictions without distinction on grounds of nationality or residence'.

upon which the provisions concerning the free movement of persons and services are based.[32]

It does not come as a surprise, therefore, that the Court of Justice takes the view that Article 18 TFEU has been 'implemented' and has been given 'specific expression' by the free movement provisions in the areas of work, establishment, and services.[33] In some judgments, the Court has added that the violation of one of these free movement rights implies that the general prohibition of discrimination on grounds of nationality has been violated too.[34] Equally, the Court has sometimes concluded that Article 18 TFEU has *not* been violated because the free movement right at issue has

32 See e.g. Bernard 1996, p. 97; Baquero Cruz 1999, p. 614; Van den Bogaert 2005, p. 121-124; Craig & De Búrca 2015, p. 796, referring to Opinion A-G Mayras, Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, ECLI:EU:C:1974:121; Barnard 2016, p. 217.

33 These and similar formulations are used in Case 2/74, *Jean Reyners v. Belgium*, ECLI:EU:C:1974:68, at 16; Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140, at 32; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115, at 6; Case 251/83, *Eberhard Haug-Adrion v. Frankfurter Versicherungs-AG*, ECLI:EU:C:1984:397, at 14; Case 186/87, *Ian William Cowan v. Le Trésor public*, ECLI:EU:C:1989:47, at 14; Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 12; Case C-10/90, *Maria Masgio v. Bundesknappschaft*, ECLI:EU:C:1991:107, at 13; Case C-246/89, *Commission v. United Kingdom*, ECLI:EU:C:1991:375, at 18; Case C-1/93, *Halliburton Services v. Staatssecretaris van Financiën*, ECLI:EU:C:1994:127, at 12; Case C-379/92, *Matteo Peralta*, ECLI:EU:C:1994:296, at 18; Case C-131/96, *Carlos Mora Romero v. Landesversicherungsanstalt Rheinprovinz*, ECLI:EU:C:1997:317, at 11; Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des Services Fiscaux du Bas-Rhin*, ECLI:EU:C:1998:221, at 38; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 20-21; Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, ECLI:EU:C:1999:533, at 17; Case C-251/98, *C. Baars v. Inspecteur der Belastingen Particulieren*, ECLI:EU:C:2000:205, at 24; Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd and Others* (C-397/98), *Hoechst and Hoechst UK* (C-410/98) *v. Commissioners of Inland Revenue and H.M. Attorney General*, ECLI:EU:C:2001:134, at 39; Case C-289/02, *AMOK Verlags v. A & R Gastronomie*, ECLI:EU:C:2003:669, at 26; Case C-387/01, *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg*, ECLI:EU:C:2004:256, at 58; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 55; Case C-105/07, *Lammers & Van Cleeff v. Belgische Staat*, ECLI:EU:C:2008:24, at 14; Case C-94/07, *Andrea Raccanelli v. Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, ECLI:EU:C:2008:425, at 45; Case C-222/07, *UTECA v. Administración General del Estado*, ECLI:EU:C:2009:124, at 38; Case C-269/07, *Commission v. Germany*, ECLI:EU:C:2009:527, at 99; Case C-91/08, *Wall v. Stadt Frankfurt am Main, Frankfurter Entsorgungs- und Service (FES)*, ECLI:EU:C:2010:182, at 32; Case C-137/09, *Marc Michel Josemans v. Burgemeester van Maastricht*, ECLI:EU:C:2010:774, at 52; Case C-474/12, *Schiebel Aircraft v. Bundesminister für Wirtschaft, Familie und Jugend*, ECLI:EU:C:2014:2139, at 21; Case C-470/13, *Generali-Providencia Biztosító v. Közbeszerzési Hatóság Közbeszerzési Döntőbizottság*, ECLI:EU:C:2014:2469, at 31; Case C-703/17, *Krah v. Universität Wien*, ECLI:EU:C:2019:850, at 19.

34 Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 12 (referring to Case 2/74, *Jean Reyners v. Belgium*, ECLI:EU:C:1974:68; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115; Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101); Case C-246/89, *Commission v. United Kingdom*, ECLI:EU:C:1991:375, at 18; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 20.

not been violated either.[35] And there is one phrase that turns up in nearly every judgment, namely that Article 18 TFEU 'applies independently only to situations governed by [Union] law in regard to which the Treaty lays down no specific prohibition of discrimination'.[36] It is on this firm basis that writers characterise Article 18 TFEU as the *lex generalis* and the free movement provisions as *leges speciales*.[37]

5.2.3 From a discrimination approach to a restriction approach

If the general prohibition of discrimination on grounds of nationality forms the conceptual basis of the free movement of workers, the freedom of establishment, and the freedom to provide and receive services, then it is tempting to conclude that these free movement provisions only prohibit conduct which qualifies as direct or indirect discrimination. This impression is confirmed in early judgments such as *Walrave and Koch*, where the Court of Justice held that the free movement provisions in the areas of

35 Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101, at 27; Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron*, ECLI:EU:C:1991:161, at 36; Case C-112/91, *Hans Werner v. Finanzamt Aachen-Innenstadt*, ECLI:EU:C:1993:27, at 20; Case C-222/07, *UTECA v. Administración General del Estado*, ECLI:EU:C:2009:124, at 39.

36 These and similar formulations are used in Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 13; Case C-10/90, *Maria Masgio v. Bundesknappschaft*, ECLI:EU:C:1991:107, at 13; Case C-179/90, *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli*, ECLI:EU:C:1991:464, at 11; Case C-246/89, *Commission v. United Kingdom*, ECLI:EU:C:1991:375, at 17; Case C-1/93, *Halliburton Services v. Staatssecretaris van Financiën*, ECLI:EU:C:1994:127, at 12; Case C-379/92, *Matteo Peralta*, ECLI:EU:C:1994:296, at 18; Case C-131/96, *Carlos Mora Romero v. Landesversicherungsanstalt Rheinprovinz*, ECLI:EU:C:1997:317, at 10; Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des Services Fiscaux du Bas-Rhin*, ECLI:EU:C:1998:221, at 37; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 20; Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, ECLI:EU:C:1999:533, at 16; Case C-176/96, *Jyri Lehtonen and Castors Braine v. FRBSB*, ECLI:EU:C:2000:201, at 37; Case C-251/98, *C. Baars v. Inspecteur der Belastingen Particulieren*, ECLI:EU:C:2000:205, at 23; Case C-411/98, *Angelo Ferlini v. Centre Hospitalier de Luxembourg*, ECLI:EU:C:2000:530, at 39; Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd and Others* (C-397/98), *Hoechst and Hoechst UK* (C-410/98) *v. Commissioners of Inland Revenue and H.M. Attorney General*, ECLI:EU:C:2001:134, at 38; Case C-100/01, *Ministre de l'Intérieur v. Aitor Oteiza Olazabal*, ECLI:EU:C:2002:712, at 25; Case C-289/02, *AMOK Verlags v. A & R Gastronomie*, ECLI:EU:C:2003:669, at 25; Case C-387/01, *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg*, ECLI:EU:C:2004:256, at 57; Case C-40/05, *Kaj Lyyski v. Umeå universitet*, ECLI:EU:C:2007:10, at 33; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 54; Case C-105/07, *Lammers & Van Cleeff v. Belgische Staat*, ECLI:EU:C:2008:24, at 14; Case C-222/07, *UTECA v. Administración General del Estado*, ECLI:EU:C:2009:124, at 37; Case C-269/07, *Commission v. Germany*, ECLI:EU:C:2009:527, at 98; Case C-137/09, *Marc Michel Josemans v. Burgemeester van Maastricht*, ECLI:EU:C:2010:774, at 51; Case C-385/12, *Hervis Sport- és Divatkereskedelmi*, ECLI:EU:C:2014:47, at 25; Case C-474/12, *Schiebel Aircraft v. Bundesminister für Wirtschaft, Familie und Jugend*, ECLI:EU:C:2014:2139, at 20; Case C-703/17, *Krah v. Universität Wien*, ECLI:EU:C:2019:850, at 19.

37 See e.g. Böhning 1973, p. 82; Baquero Cruz 1999, p. 613-614; Davies 2003, p. 188-189; Van den Bogaert 2005, p. 121; Hartkamp 2011, p. 164-165; Krenn 2012, p. 193; Veldhoen 2013, p. 370-371; Barnard 2016, p. 217; McDonnell 2018, p. 438.

work and services 'prohibit any discrimination based on nationality in the performance of the activity to which they refer'.[38] In later judgments, the Court has also suggested that the freedom of establishment had not been restricted because there was no direct or indirect discrimination.[39] Against this background, one may be inclined to conclude that only directly and indirectly discriminatory measures could amount to a restriction of the free movement provisions.

This conclusion may have been true in the days of Bruno Walrave and Norbert Koch, when paced races still kept audiences enthralled, but it is not true anymore. Gradually yet firmly, the Court has widened the scope of application of the free movement provisions. Nowadays, free movement law does not only target any 'discrimination' – either directly or indirectly – between nationals engaging in economic activities, but also any 'restriction' which prevents or substantially hinders their access to the market. In the words of Barnard, the Court has shifted 'from a discrimination approach to a restriction approach'.[40] This shift can be seen in judgments as early as *Säger*, where the Court held:

> 'It should first be pointed out that Article [56 TFEU] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.'[41]

This is not a word game. Adopting the restriction approach instead of the discrimination approach actually makes a difference. Take the *Bosman* case as an illustration. Jean-Marc Bosman, a professional football player employed by a Belgian first division club, wanted to play for a French football club. His efforts to find a new club were frustrated by the transfer rules adopted by several professional football associations. These rules obliged the new club to pay the former club a fee to recoup part of the investments

38 Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140, at 6. See also Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, ECLI:EU:C:1974:131, at 25: 'The provisions of [Article 56 TFEU] abolish all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided.'

39 Case 182/83, *Robert Fearon and Company Limited v. The Irish Land Commission*, ECLI:EU:C:1984:335, at 10-11; Case 221/85, *Commission v. Belgium*, ECLI:EU:C:1987:81, at 11-12.

40 Barnard 2016, p. 225. See also Barnard 2001, p. 48-52; Van den Bogaert 2005, p. 124-130; Schepel 2012, p. 180-181; Van den Bogaert, Cuyvers & Antonaki 2018, p. 551-552.

41 Case C-76/90, *Manfred Säger v. Dennemeyer & Co.*, ECLI:EU:C:1991:331, at 12. The Court repeats the same formulations in Case C-43/93, *Raymond Vander Elst v. OMI*, ECLI:EU:C:1994:310, at 14.

in the player. This transfer system applied to all players, irrespective of their nationality and irrespective of the place of residence of the clubs involved. This made it hard to plead a case of direct or indirect discrimination. After all, the nationality of the player was not relevant and the rules did not have, or were likely to have had, a particularly detrimental effect on players wishing to move to another Member State as compared to players wishing to move to another club within the same Member State.

Nevertheless, the Court agreed with Bosman that the transfer rules 'are likely to restrict the freedom of movement of players' by 'preventing or deterring them from leaving the clubs to which they belong' upon expiry of their employment contracts.[42] Even though the transfer rules applied to all clubs and all players in the same manner, the Court found that they nonetheless constituted an obstacle to the freedom of movement for workers:

> 'It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. (…).'[43]

The same line of reasoning was followed in *Alpine Investments*, a case about the compatibility of a prohibition of cold-calling with the free movement of services.[44] In fact, numerous judgments confirm that Article 56 TFEU requires the abolition of 'any restriction' that is 'liable to prohibit, impede or render less advantageous' the exercise by service providers of their rights of free movement, even if the restriction applies 'without distinction'.[45]

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42 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 99.

43 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 103.

44 Case C-384/93, *Alpine Investments v. Minister van Financiën*, ECLI:EU:C:1995:126, at 34-39.

45 See e.g. Case C-272/94, *Michel Guiot and Climatec*, ECLI:EU:C:1996:147, at 10; Case C-3/95, *Reisebüro Broede v. Gerd Sandker*, ECLI:EU:C:1996:487, at 25; Case C-222/95, *Parodi v. Banque H. Albert de Bary et Cie*, ECLI:EU:C:1997:345, at 18; Joined Cases C-369/96 and C-376/96, *Arblade* (C-369/96) and *Leloup* (C-376/96), ECLI:EU:C:1999:575, at 33; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and Others*, ECLI:EU:C:2001:564, at 28; Case C-165/98, *André Mazzoleni and Inter Surveillance Assistance*, ECLI:EU:C:2001:162, at 22; Case C-164/99, *Portugaia Construções*, ECLI:EU:C:2002:40, at 16; Case C-279/00, *Commission v. Italy*, ECLI:EU:C:2002:89, at 31; Case C-168/04, *Commission v. Austria*, ECLI:EU:C:2006:595, at 36; Case C-244/04, *Commission v. Germany*, ECLI:EU:C:2006:49, at 30; Case C-433/04, *Commission v. Belgium*, ECLI:EU:C:2006:702, at 28; Case C-250/06, *United Pan-Europe Communications Belgium and Others*, ECLI:EU:C:2007:783, at 29; Case C-350/07, *Kattner Stahlbau v. Maschinenbau- und Metall- Berufsgenossenschaft*, ECLI:EU:C:2009:127, at 78; Case C-458/08, *Commission v. Portugal*, ECLI:EU:C:2010:692, at 83; Case C-577/10, *Commission v. Belgium*, ECLI:EU:C:2012:814, at 38; Case C-475/11, *Kostas Konstantinides*, ECLI:EU:C:2013:542, at 44; Case C-49/16, *Unibet International v. Nemzeti Adó- és Vámhivatal Központi Hivatala*, ECLI:EU:C:2017:491, at 32.

Similar formulations have been used in judgments about the interpretation of Articles 45 and 49 TFEU.[46]

The Court's shift from a discrimination approach to a restriction approach has attracted considerable attention from commentators. Some of them reject the restriction approach altogether. Davies, for instance, argues that it is impossible to take free movement law beyond discrimination without coming into conflict with the 'foundational legal, political and economic principles of the internal market'.[47] In his view, entirely non-discriminatory restrictions simply cannot exist, because the application of free movement law to such restrictions amounts to positive action.[48] However, it cannot be denied that the objective to realise an internal market is 'functionally broad'.[49] It may be recalled that the Treaty itself speaks of 'restrictions' to free movement[50] and defines the internal market as 'an area without internal frontiers'.[51] For these reasons alone, it is arguable that restrictions can be caught by the free movement provisions, whether or not they discriminate.[52]

The real difficulty, of course, is to determine where the outer boundaries lie. Surely not every non-discriminatory restriction should be subjected to scrutiny.[53] In the present context we are not, however, concerned with drawing these lines. For our purposes, it is sufficient to observe that the Court has repeatedly confirmed that genuinely non-discriminatory restrictions may, in principle, breach the free movement rules, and that this approach differs from, and is broader in scope than, an approach which focuses exclusively on directly and indirectly discriminatory restrictions. This observation naturally raises a follow-up question which does concern us: what, if any, are the consequences of this development for the interpretation of Article 18 TFEU?

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46 Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*, ECLI:EU:C:1993:125, at 32 (concerning Art. 45 and 49 TFEU); Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, at 37 (Art. 49 and 56 TFEU); Case C-190/98, *Volker Graf v. Filzmoser Maschinenbau*, ECLI:EU:C:2000:49, at 18 (Art. 45 TFEU); Case C-387/01, *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg*, ECLI:EU:C:2004:256, at 51 (Art. 45 TFEU); Case C-464/02, *Commission v. Denmark*, ECLI:EU:C:2005:546, at 45 (Art. 45 TFEU).

47 Davies 2011, p. 9. See also Davies 2003, p. 93-115.

48 Davies 2011, p. 7 and 9.

49 Weatherill 2017, p. 43.

50 Art. 49 and 56 TFEU.

51 Art. 26 (2) TFEU.

52 See e.g. Opinion A-G Jacobs, Case C-384/93, *Alpine Investments v. Minister van Financiën*, ECLI:EU:C:1995:15, at 47-50; Van den Bogaert 2005, p. 124; Wollenschläger 2011, p. 7-8; Tryfonidou 2014, p. 396.

53 Van den Bogaert 2005, p. 130-135; Barnard 2016, p. 228-232.

5.2.4 Consequences for the interpretation of Article 18 TFEU?

What does the shift from a discrimination approach to a restriction approach mean for the interpretation of Article 18 TFEU and, consequently, for its relation to the provisions pertaining to the free movement of workers, the freedom of establishment, and the freedom to provide and receive services? Has the restriction approach worked its way up to Article 18 TFEU?

If we assume that a violation of any of these free movement provisions 'automatically and inevitably' constitutes a violation of Article 18 TFEU,[54] as the Court has occasionally done,[55] then we may be inclined to conclude that Article 18 TFEU requires not only the elimination of all discrimination but also the abolition of any non-discriminatory restriction which prevents or substantially hinders access to the market. Along these lines, Schepel has suggested that the interpretation of Article 18 TFEU keeps pace with the interpretation of the free movement provisions:

> 'It seems arguable, then, that rather than Article 18 limiting the horizontal application of free movement provisions to discriminatory measures, the free movement provisions have stretched the horizontal application of Article 18 to any restriction of free movement.'[56]

It must be admitted that the Court has, at times, created the impression that Article 18 TFEU governs any restriction of free movement. Schepel referred to *Ferlini*, where the Court held that Article 18 TFEU applies to actions 'which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty'.[57] Another, more recent example can be found in the judgment *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, where the Court reviewed the rules adopted by the German athletics association both against the general prohibition of discrimination on grounds of nationality and against Article 21 TFEU.[58] The latter provision is commonly considered to be the *lex generalis* in relation to the provisions governing the free

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54 Van den Bogaert 2005, p. 121.

55 Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 12 (referring to Case 2/74, *Jean Reyners v. Belgium*, ECLI:EU:C:1974:68; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115; Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101); Case C-246/89, *Commission v. United Kingdom*, ECLI:EU:C:1991:375, at 18; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 20.

56 Schepel 2012, p. 189.

57 Case C-411/98, *Angelo Ferlini v. Centre Hospitalier de Luxembourg*, ECLI:EU:C:2000:530, at 50, referring to Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140; Case 43/75, *Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena*, ECLI:EU:C:1976:56; Case C-415/93, *Union Royale Belge des Societes de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463.

58 It must be noted that the Court has read these provisions in conjunction with Article 165 TFEU, which determines that the Union 'shall contribute to the promotion of European sporting issues' and that Union action in this area shall be aimed at 'promoting fairness and openness in sporting competitions'.

movement of persons, as it generally protects the right of Union citizens to move and reside freely within the territory of the Member States.[59] Having found that the athletics association had restricted freedom of movement as protected by Article 21 TFEU,[60] the Court examined whether this restriction could be justified in the light of Articles 18 and 21 TFEU.[61] The application of Article 18 TFEU in this context may lead one to believe that the general prohibition of discrimination on grounds of nationality applies to any restriction of free movement, even though the nationality requirement at issue was clearly discriminatory and not merely restrictive.[62]

The reasoning expressed by the Grand Chamber in *International Jet Management*, however, makes clear that the substance of Article 18 TFEU has not been extended beyond discrimination.[63] International Jet Management is an airline company based in Austria. It operates private flights from Russia and Turkey to Germany without having obtained permission to enter German airspace. Unlike airline companies registered in Germany, foreign airline companies are required to obtain such permission in advance, even if they possess a valid operating licence issued in another Member State. Because International Jet Management did not have the permission to enter German airspace, the company is prosecuted and fined. On appeal, the company relies upon Article 18 TFEU. The distinction between airline companies registered in Germany and airline companies registered in Austria would violate the general prohibition of any discrimination on grounds of nationality. The *Oberlandesgericht Braunschweig* decides to refer several questions concerning the interpretation of Article 18 TFEU to the Court of Justice.

The key question is whether Article 18 TFEU is applicable at all.[64] It is important to observe, in this regard, that International Jet Management possessed a valid operating license, issued by the Austrian Ministry of Transport in accordance with Regulation (EC) No 1008/2008.[65] The Court observes that this Regulation does not only cover flights made within the European Union, but also flights between a third country and a Member State.[66] In fact, the Regulation prohibits undertakings such as International Jet Management to transport air passengers without possessing a valid

59 E.g. by Davies 2003, p. 189; Wollenschläger 2011, p. 30; Tryfonidou 2014, p. 386.

60 Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:497, at 47.

61 See, explicitly, Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:497, at 65.

62 As noted in Opinion A-G Tanchev, Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:181, at 85.

63 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171.

64 Opinion A-G Bot, Case C-628/11, *International Jet Management*, ECLI:EU:C:2013:279, at 28.

65 Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community.

66 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 41-46.

operating license.[67] Because the facts of the case are governed by secondary legislation, the Court holds that the situation falls within the scope of Union law within the meaning of Article 18 TFEU.[68] This conclusion cannot, in the view of the Court, be called into question by the fact that the Union legislature has not harmonised the provision of air transport services between the Member States and third countries as such.[69]

Does this mean that Article 18 TFEU is applicable to the case at hand? The French and German governments object. They draw attention to Article 58 (1) TFEU, which determines that transport services are governed by Title VI of the TFEU. It is trite law that transport services are not, therefore, governed by Article 56 TFEU.[70] Title VI, for its part, only applies to transport by rail, road, and inland waterway.[71] Sea and air transport are not, therefore, subject to the general rules contained in Title VI,[72] but can only be regulated by the Union legislature in accordance with the ordinary legislative procedure.[73] If the general prohibition of discrimination on grounds of nationality were to be applied to air transport services, so the French and German governments contend, the freedom to provide services laid down in Article 56 TFEU would effectively be applied through the backdoor of Article 18 TFEU. This would deprive the derogation provided for in Article 58 (1) TFEU of 'any useful effect'.[74]

In other words, the French and German governments argue that if the specific prohibition of discrimination on grounds of nationality is not applicable, the general prohibition of discrimination on grounds of nationality should not be applicable either. The Court does not buy this argument. It first explains the meaning of the prohibition laid down in Article 56 TFEU:

> 'According to the Court's settled case-law, Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than

67 Art. 3 (1), Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community.

68 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 53. See also Opinion A-G Bot, Case C-628/11, *International Jet Management*, ECLI:EU:C:2013:279, at 42-56.

69 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 39.

70 Joined Cases 209/84 to 213/84, *Asjes and Others*, ECLI:EU:C:1986:188, at 37; Case 4/88, *Lambregts Transportbedrijf v. Belgian State*, ECLI:EU:C:1989:320, at 9; Case C-49/89, *Corsica Ferries France v. Direction générale des douanes*, ECLI:EU:C:1989:649, at 10; Case C-17/90, *Pinaud Wieger v. Bundesanstalt für den Güterfernverkehr*, ECLI:EU:C:1991:416, at 7; Case C-467/98, *Commission v. Denmark ('Open Skies')*, ECLI:EU:C:2002:625, at 123; Case C-382/08, *Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirchen*, ECLI:EU:C:2011:27, at 22.

71 Art. 100 (1) TFEU.

72 Case 167/73, *Commission v. France*, ECLI:EU:C:1974:35, at 32; Joined Cases 209/84 to 213/84, *Asjes and Others*, ECLI:EU:C:1986:188, at 44; Case C-178/05, *Commission v. Greece*, ECLI:EU:C:2007:317, at 52; Case C-382/08, *Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirchen*, ECLI:EU:C:2011:27, at 21.

73 Art. 100 (2) TFEU.

74 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 55.

> that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (…).'[75]

The Court then explains that this prohibition is wider in scope than the prohibition laid down in Article 18 TFEU:

> '[Article 56 TFEU] therefore has a scope which exceeds the prohibition of discrimination provided for in Article 18 TFEU.'[76]

Responding to the arguments raised by the French and German governments, the Court submits that Article 58 (1) TFEU retains its intended effect. This provision may not exclude the application of the general prohibition of discrimination on grounds of nationality, but it does deprive air carriers of the possibility to challenge entirely non-discriminatory restrictions to free movement:

> 'Therefore, while the Member States are entitled, under Article 58(1) TFEU, to impose certain restrictions on the provision of air transport services in respect of the routes between third countries and the European Union in so far as (…) the EU legislature has not exercised the power conferred upon it by Article 100(2) TFEU to liberalise that type of service, those States nevertheless remain subject to the general principle of non-discrimination on grounds of nationality enshrined in Article 18 TFEU.'[77]

Importantly, the foregoing demonstrates that we should not take the statement, expressed so often by the Court,[78] that Article 18 TFEU 'applies independently only to situations governed by Union law in regard to which the Treaty lays down no specific prohibition of discrimination' to mean that Article 18 TFEU can never be applied to cross-border activities employed by workers, by self-employed persons and companies, and by providers of services. Proceeding from the assumption that Article 18 TFEU is applicable as soon as the facts fall within the scope of Union law, the Court only accepts its exclusion if the authors of the Treaties have expressly provided for a derogation.[79] The mere fact that transport activities are excluded from the scope of application of the freedom to provide services does not, therefore, imply that they are also excluded from the scope of application of the

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75 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 57, referring to Case C-475/11, *Kostas Konstantinides*, ECLI:EU:C:2013:542, at 44.

76 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 58.

77 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 59.

78 See *supra* section 5.2.2.

79 See also the Opinion A-G Bot, Case C-628/11, *International Jet Management*, ECLI:EU:C:2013:279, at 40.

general principle of non-discrimination on grounds of nationality.[80] This line of reasoning has also been followed in earlier judgments, in which the Court decided that transport activities remain subject to the free movement rules in the area of work[81] and the competition rules.[82]

For present purposes, it is important to observe, moreover, that the Court has expressly distinguished the prohibitions laid down in Article 18 TFEU and in Article 56 TFEU. After *International Jet Management*, it is clear that entirely non-discriminatory restrictions of the right to provide services are governed only by Article 56 TFEU, and not by Article 18 TFEU. We may safely conclude that the same reasoning applies when it comes to the relationship between Article 18 TFEU and the free movement of work and the freedom of establishment. Contrary to what Schepel has suggested, the substance of the general prohibition of discrimination on grounds of nationality has not been extended beyond discrimination. Not every restriction of free movement is directly or indirectly discriminatory within the meaning of Article 18 TFEU.[83] In some respects, free movement law is broader in scope than the general prohibition of discrimination on grounds of nationality.

In the light of these findings, we must conclude that the free movement provisions cannot, in all situations, be characterised as the *leges speciales* and that the general prohibition of all discrimination on grounds of nationality cannot, in all situations, be characterised as the *lex generalis*.[84] It has become impossible, therefore, to maintain the view that a violation of one of the free movement rights automatically and inevitably constitutes a violation of Article 18 TFEU.[85] Nor can it be said that the absence of a violation of one of the free movement rights necessarily implies that Article 18 TFEU has not been violated either.[86] It is advised that the Court does not create these impressions in its judgments anymore.

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80 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 59.

81 Case 167/73, *Commission v. France*, ECLI:EU:C:1974:35, at 28-33.

82 Joined Cases 209/84 to 213/84, *Asjes and Others*, ECLI:EU:C:1986:188, at 40-45; Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 5.

83 Already observed by Baquero Cruz 1999, p. 614.

84 As many writers assume, e.g. Böhning 1973, p. 82; Van den Bogaert 2005, p. 121; Hartkamp 2011, p. 164-165; Krenn 2012, p. 193; Veldhoen 2013, p. 370-371; McDonnell 2018, p. 438.

85 Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 12 (referring to Case 2/74, *Jean Reyners v. Belgium*, ECLI:EU:C:1974:68; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115; Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101); Case C-246/89, *Commission v. United Kingdom*, ECLI:EU:C:1991:375, at 18; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 20.

86 As the Court has concluded in Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101, at 27; Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron*, ECLI:EU:C:1991:161, at 36; Case C-112/91, *Hans Werner v. Finanzamt Aachen-Innenstadt*, ECLI:EU:C:1993:27, at 20; Case C-222/07, *UTECA v. Administración General del Estado*, ECLI:EU:C:2009:124, at 39.

5.2.5 Concurrence of Article 18 TFEU and free movement law?

In view of the foregoing analysis we will, for now, assume that the facts of a case do, on the face of it, fall within the scope of application of both Article 18 TFEU and one of the free movement provisions in the areas of work, establishment, and services. In other words, we will focus on directly and indirectly discriminatory restrictions to free movement, and leave aside entirely non-discriminatory restrictions. The question to consider is whether the free movement provisions affect the scope of application of the general prohibition of discrimination on grounds of nationality, so that the latter cannot be relied upon.

Once again, it seems that the approach of the Court has developed over time. Initially, the Court did not shy away from examining all the relevant rules simultaneously. In *Walrave and Koch*, for instance, the Court reviewed the rules of the *Association Union Cycliste Internationale* both against the general prohibition of all discrimination on grounds of nationality and against the provisions governing the free movement of work and services.[87] In later judgments, however, the Court did not insert Article 18 TFEU in the operative part anymore.[88] Sometimes, the Court added that it would be 'unnecessary' to give a ruling on the interpretation of Article 18 TFEU.[89]

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87 Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140. The same approach has been followed by the Court in Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115, concerning Art. 18, 45 and 56 TFEU; Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101, concerning Art. 18, 49 and 56 TFEU; Case 251/83, *Eberhard Haug-Adrion v. Frankfurter Versicherungs-AG*, ECLI:EU:C:1984:397, concerning Art. 18, 45 and 56 TFEU; Case 186/87, *Ian William Cowan v. Le Trésor public*, ECLI:EU:C:1989:47, concerning Art. 18 and 56 TFEU; Case C-10/90, *Maria Masgio v. Bundesknappschaft*, ECLI:EU:C:1991:107, concerning Art. 18 and 45 TFEU; Case C-379/92, *Matteo Peralta*, ECLI:EU:C:1994:296, concerning, *inter alia*, Art. 18, 45 and 56 TFEU.

88 Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218; Case C-419/92, *Ingetraut Scholz v. Opera Universitaria di Cagliari and Cinzia Porcedda*, ECLI:EU:C:1994:62; Case C-105/07, *Lammers & Van Cleeff v. Belgische Staat*, ECLI:EU:C:2008:24; Case C-269/07, *Commission v. Germany*, ECLI:EU:C:2009:527.

89 These and similar formulations are used in: Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 28; Case C-131/96, *Carlos Mora Romero v. Landesversicherungsanstalt Rheinprovinz*, ECLI:EU:C:1997:317, at 12; Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des Services Fiscaux du Bas-Rhin*, ECLI:EU:C:1998:221, at 39; Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, ECLI:EU:C:1999:533, at 17; Case C-100/01, *Ministre de l'Intérieur v. Aitor Oteiza Olazabal*, ECLI:EU:C:2002:712, at 26; Case C-289/02, *AMOK Verlags v. A & R Gastronomie*, ECLI:EU:C:2003:669, at 26; Case C-387/01, *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg*, ECLI:EU:C:2004:256, at 59; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 55; Case C-91/08, *Wall v. Stadt Frankfurt am Main, Frankfurter Entsorgungs- und Service (FES)*, ECLI:EU:C:2010:182, at 32; Case C-470/13, *Generali-Providencia Biztosító v. Közbeszerzési Hatóság Közbeszerzési Döntőbizottság*, ECLI:EU:C:2014:2469, at 31; Case C-474/12, *Schiebel Aircraft v. Bundesminister für Wirtschaft, Familie und Jugend*, ECLI:EU:C:2014:2139, at 22.

Sometimes, the Court even concluded that the general prohibition of discrimination on grounds of nationality did not apply at all because the facts fell within the scope of one or more free movement rules.[90] Against this background, Baquero Cruz has suggested that the free movement provisions automatically exclude the application of Article 18 TFEU:

> 'In the presence of a more concrete provision Article [18 TFEU] steps back, or more precisely, its normative substance is applied through the more concrete provision.'[91]

One may wonder whether it is necessary to exclude the general prohibition of discrimination on grounds of nationality altogether as soon as, and for the very reason that, a dispute is governed by a free movement provision. In many situations, the application of these rules will not lead to different outcomes. In some respects, however, the rules do differ, which may lead to different results. This becomes clear if we adopt the perspective of the defendant. He may take comfort from the fact that the free movement provisions expressly allow for justification defences based on grounds of public policy, public security, and public health.[92] Take Article 52 (1) TFEU as an illustration:

> 'The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.'

These written derogations can be relied upon in respect of any conduct breaching the free movement right at issue, whether the restriction is directly or indirectly discriminatory.[93] In addition, indirectly discriminatory restrictions may be 'objectively' justified on the basis of unwritten derogations developed by the Court of Justice under the so-called 'rule of reason' doctrine.[94] In proceedings concerning legal relationships between private individuals, the Court has recognised several objective justifications

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90 E.g. Case C-1/93, *Halliburton Services v. Staatssecretaris van Financiën*, ECLI:EU:C:1994:127, at 12; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 21; Case C-251/98, *C. Baars v. Inspecteur der Belastingen Particulieren*, ECLI:EU:C:2000:205, at 25; Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd and Others* (C-397/98), *Hoechst and Hoechst UK* (C-410/98) *v. Commissioners of Inland Revenue and H.M. Attorney General*, ECLI:EU:C:2001:134, at 40; Case C-137/09, *Marc Michel Josemans v. Burgemeester van Maastricht*, ECLI:EU:C:2010:774, at 52.

91 Baquero Cruz 1999, p. 613.

92 Art. 45 (3), Art. 52, and Art. 62 TFEU. Given the focus of this book on private relationships, we will not examine the public service and the official authority exceptions provided for in Art. 45 (4) and Art. 51 TFEU respectively.

93 Non-discriminatory restrictions are not discussed here, for the reasons explained above.

94 Van den Bogaert 2005, p. 149-152.

of 'general interest', such as maintaining a balance between sports clubs,[95] encouraging the recruitment and training of young players,[96] and the right to take collective action for the protection of workers against possible social dumping.[97] In order for such an objective justification defence to enliven, it must be demonstrated that the conduct is suitable for achieving an imperative requirement in the general interest and does not go beyond what is necessary for that purpose.[98]

Conduct which indirectly discriminates on the basis of nationality can also be objectively justified on the basis of Article 18 TFEU.[99] Crucially, however, Article 18 TFEU does not contain any written justification grounds. Unlike the free movement provisions, it does not expressly allow for justification defences based on grounds of public policy, public security, and public health. Does this mean that direct discrimination on grounds of nationality can never be justified in the context of Article 18 TFEU?

This question is deeply controversial, no doubt because direct discrimination conflicts sharply with the very principle of equal treatment. The general understanding is that direct discrimination can only ever be justified on the basis of the derogation grounds expressly mentioned in the Treaties or in secondary legislation.[100] It has sometimes been suggested that the justification of direct discrimination should be allowed in exceptional situations,[101] and there are some judgments in which it appears as if the

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95 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 106; Case C-176/96, *Jyri Lehtonen and Castors Braine v. FRBSB*, ECLI:EU:C:2000:201, at 53-54.

96 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 106; Case C-325/08, *Olympique Lyonnais v. Olivier Bernard and Newcastle United*, ECLI:EU:C:2010:143, at 39.

97 Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 103.

98 See e.g. Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*, ECLI:EU:C:1993:125, at 32; Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, at 37; Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 104; Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 75.

99 See e.g. Case C-274/96, *Horst Otto Bickel and Ulrich Franz*, ECLI:EU:C:1998:563, at 27; Case C-224/98, *Marie-Nathalie D'Hoop v. Office national de l'emploi*, ECLI:EU:C:2002:432, at 36; Case C-148/02, *Carlos Garcia Avello v. État belge*, ECLI:EU:C:2003:539, at 31; Case C-209/03, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*, ECLI:EU:C:2005:169, at 54; Case C-382/08, *Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirchen*, ECLI:EU:C:2011:27, at 35; Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 68, and in the context of a dispute between an individual and a national sports association, Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:497, at 67.

100 Prechal 2004, p. 545; Van den Bogaert 2005, p. 156; Ellis & Watson 2012, p. 172-174; Tobler 2013, p. 460; Craig & De Búrca 2015, p. 938.

101 Notably by A-G Van Gerven, in Opinion A-G Van Gerven, Case C-132/92, *Birds Eye Walls Ltd. v. Friedel M. Roberts*, ECLI:EU:C:1993:868, at 12-14, concerning the possibility of justifying discrimination directly based on sex.

Court has accepted this possibility.[102] In *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, it may be recalled, the Court first concluded that the nationality requirement imposed by the German athletics association constituted a restriction of free movement and then examined possible objective justification defences,[103] even though the association clearly treated foreign athletes differently because of their nationality.[104] By adopting a restriction-based approach instead of a discrimination-based approach, however, the Court formally dodged the question. Apparently, the Court is not yet prepared to expressly confirm that directly discriminatory conduct can be justified. At this stage we must, therefore, conclude that Article 18 TFEU does not allow for justification defences in cases concerning direct discrimination.

For this reason, it is important to know that the application of the general prohibition of discrimination on grounds of nationality is excluded if the facts of the case fall within the scope of application of the free movement provisions governing workers, self-employed persons and companies, and service providers. In such situations, the alleged infringer may rely upon the express derogations available under these free movement provisions, even if his conduct appears to be directly discriminatory and would, for that reason, not be justifiable under Article 18 TFEU. This is not to say that the principle of non-discrimination has no role to play at all. The fact that the conduct is directly discriminatory must be taken into account when considering whether the means chosen were necessary and appropriate for attaining the stated objective.[105] But it is not impossible to justify the conduct from the outset. Even though the free movement provisions can no longer be characterised as the *leges speciales* in relation to Article 18 TFEU, they clearly do have priority once the facts fall within their scope of application.

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102 Case 106/83, *Sermide v. Cassa Conguaglio Zucchero and Others*, ECLI:EU:C:1984:394, at 28: 'It is appropriate in the first place to point out that under the principle of non-discrimination between Community producers or consumers, which is enshrined in the second subparagraph of [Article 40 (3) TFEU] and which includes the prohibition of discrimination on grounds of nationality laid down in the first paragraph of [Article 18 TFEU], comparable situations must not be treated differently and different situations must not be treated in the same way *unless such treatment is objectively justified*' (emphasis added); Case C-122/96, *Stephen Austin Saldanha and MTS Securities Corporation v. Hiross Holding*, ECLI:EU:C:1997:458, at 29: 'Suffice it in this regard to point out that, even though the object of a provision such as that at issue in the main proceedings (…) *is not as such contrary to* [Article 18 TFEU]' (emphasis added). See also Case C-408/92, *Smith and Others v. Avdel Systems*, ECLI:EU:C:1994:349, at 30, in a statement concerning today's Art. 157 TFEU: 'Even assuming that it would, in this context, be possible *to take account of objectively justifiable considerations* (…)' (emphasis added).

103 Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:497, at 42-47 and 55-67 respectively. The same approach is adopted in Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 116-137.

104 As noted in Opinion A-G Tanchev, Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:181, at 85.

105 See Van den Bogaert 2005, p. 158; Craig & De Búrca 2015, p. 759.

5.2.6 Interim conclusion

This section has examined the relationship between the general prohibition of discrimination on grounds of nationality enshrined in Article 18 TFEU and the treaty provisions pertaining to the free movement of persons and services. Importantly, the section has demonstrated that Article 18 TFEU cannot, in all situations, be considered the *lex generalis* and that the free movement provisions cannot, in all situations, be considered *leges speciales*. The reason is that the Court of Justice of the European Union has replaced the concept of discrimination with the concept of restriction in the context of the law of free movement. The precise content of the latter concept may not always be entirely clear, but its scope is evidently broader than the concept of discrimination. Crucially, the Court has so far refused to adopt the concept of restriction in the context of Article 18 TFEU. In fact, it has explicitly confirmed that the scope of the general prohibition of discrimination on grounds of nationality does not extend beyond discrimination. In the light of these developments, we must conclude that not every restriction is governed by Article 18 TFEU anymore. Consequently, Article 18 TFEU can no longer be considered the all-embracing *lex generalis* as compared with the free movement provisions.

As soon as the facts of the case do fall within the scope of application of one of the free movement provisions, however, the Court tends to exclude the application of the general prohibition of discrimination on grounds of nationality altogether. This section has questioned whether this solution is necessary. After all, the application of the two regimes will not necessarily lead to different outcomes. Yet the section has also discussed one example of a situation in which it does matter that recourse to Article 18 TFEU is excluded. Contrary to Article 18 TFEU, the free movement provisions expressly allow for justification defences based on grounds of public policy, public security, and public health. In cases concerning directly discriminatory restrictions to free movement based on nationality, the defendant may take comfort from the fact that he can rely upon such defences in order to justify conduct which would not escape scrutiny under Article 18 TFEU.

5.3 Articles 101 and 102 TFEU

5.3.1 Introduction

Whereas the previous section has examined the relationship between the general prohibition of discrimination on grounds of nationality and the free movement provisions governing persons and services, the current section will focus on the area of competition law. We will investigate the relationship between Article 101 TFEU, which deals with collusion between undertakings, and Article 102 TFEU, which deals with the market conduct of dominant undertakings. Before analysing the case law of the Court to see

whether a single set of facts may fall within the scope of application of both provisions (subsection 5.3.5), we will briefly examine the legal framework within which the provisions operate (subsection 5.3.2) and highlight their most important similarities and differences (subsections 5.3.3-5.3.4).

5.3.2 A brief overview of the provisions

Articles 101 and 102 TFEU focus on different forms of anticompetitive conduct. Article 101 TFEU prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'. In other words, Article 101 TFEU deals with collusion between several independent market operators. By contrast, Article 102 TFEU prohibits any 'abuse' by 'one or more undertakings' of a 'dominant position', that is a position of economic strength which enables the undertakings to influence the conditions of competition on the market.[106] So, Article 102 TFEU does not deal with collusion but with dominant undertakings which, separately or collectively,[107] are in a position to hinder the development of competition on the market.

Both rules form part of the only section within the TFEU that is explicitly addressed to undertakings.[108] This section also contains several institutional provisions: one rule conferring a power on the Council to adopt secondary legislation in this field (Art. 103 TFEU), and two rules concerning the competence of the national authorities (Art. 104 TFEU) and of the European Commission (Art. 104 TFEU) to investigate suspected infringements of Articles 101 and 102 TFEU. The section is rounded off with Article 106 TFEU. The first and third paragraphs of this provision are not relevant in the present context, as they concern the actions by which the Member States intervene in the market, either through public undertakings or by granting undertakings exclusive or special rights. But the second paragraph of Article 106 TFEU is relevant, because it provides a derogation to

106 Case 27/76, *United Brands v. Commission*, ECLI:EU:C:1978:22, at 65; Case 85/76, *Hoffmann-La Roche v. Commission*, ECLI:EU:C:1979:36, at 38-39.

107 On several occasions, the Court has held that two or more independent economic entities may together hold a dominant position towards other operators on the same market (see e.g. Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro and Others v. Commission ('Flat Glass')*, ECLI:EU:T:1992:38, at 357-360; Case C-393/92, *Gemeente Almelo and Others v. Energiebedrijf IJsselmij*, ECLI:EU:C:1994:171, at 41-43; Case C-96/94, *Centro Servizi Spediporto v. Spedizioni Marittima del Golfo*, ECLI:EU:C:1995:308, at 32-33; Joined Cases C-140/94, C-141/94 and C-142/94, *DIP and Others v. Comune di Bassano del Grappa and Others*, ECLI:EU:C:1995:330, at 25-26; Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 35-45).

108 Title VII, Chapter 1, Section 1, titled: 'Rules applying to undertakings'.

'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly'. On this basis, certain undertakings may be exempted from scrutiny on the basis of Articles 101 and 102 TFEU.[109]

5.3.3 Similarities between Articles 101 and 102 TFEU

Before we arrive at the justification stage, however, we will focus on the content of the two substantive norms that govern the anti-competitive conduct of undertakings: Articles 101 and 102 TFEU. There are important similarities between these provisions. To begin with, the interpretation of the concept of 'undertaking' is identical, as the Court has made clear:

> 'The Court considers that there is no legal or economic reason to suppose that the term "undertaking" in Article [101] has a different meaning from the one given to it in the context of Article [102].'[110]

The meaning of the term 'undertaking' is not defined in the TFEU, but has been worked out by the Court. By now, it is trite law that this term encompasses 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed'.[111] Importantly, the Court has ruled that the same definition applies when determining which undertaking is liable to pay compensation in respect of losses resulting from an infringement of EU competition rules.[112]

Ultimately, the definition of the term 'undertaking' – and indeed, the very scope of EU competition law – depends on the definition of the term 'economic activity'.[113] The Court has determined that, within the context of competition law, this term refers to 'any activity consisting in offering

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109 Jones & Sufrin 2016, p. 623-643.

110 Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro and Others v. Commission ('Flat Glass')*, ECLI:EU:T:1992:38, at 358.

111 Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron*, ECLI:EU:C:1991:161, at 21; Joined Cases C-159/91 and C-160/91, *Christian Poucet v. Assurances générales de France en Caisse mutuelle régionale du Languedoc-Roussillon and Daniel Pistre v. Cancava*, ECLI:EU:C:1993:63, at 17; Case C-327/12, *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture v. SOA Nazionale Costruttori – Organismo di Attestazione*, ECLI:EU:C:2013:827, at 27.

112 Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204, at 47.

113 If an organisation does not carry out economic activities, it is not considered to be an undertaking within the meaning of competition law. See e.g. Joined Cases C-159/91 and C-160/91, *Christian Poucet v. Assurances générales de France en Caisse mutuelle régionale du Languedoc-Roussillon and Daniel Pistre v. Cancava*, ECLI:EU:C:1993:63, at 19; Case C-309/99, *Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98, at 112.

goods and services on a given market'.[114] It is not necessary that the undertaking makes a profit or intends to make a profit by offering the goods and services.[115] What is required is that the activity is 'economic in nature',[116] meaning that the activity 'has not always been, and is not necessarily, carried out by public entities'.[117] As Odudu writes, the central issue under Articles 101 and 102 TFEU appears to be 'whether the potential to make a profit without state intervention exists'.[118] This basic test applies across the range of EU competition rules.[119]

A second point of similarity is that both Article 101 and 102 TFEU only govern anticompetitive conduct which 'may affect trade between Member States'. This element is interpreted in the same way under both provisions.[120] It determines the dividing line between national and EU competition law, confining the scope of the latter to conduct that is capable of having a minimum level of effect on cross-border trade. In the words of the Court, EU competition law only enters the picture if the actual or potential effect of the conduct in question on the trade between Member States is 'appreciable'.[121] The meaning of this concept for the purposes of both Article 101 and Article 102 TFEU is explained in the 'Guidelines on the effect on trade concept', in which the European Commission sums up the relevant case law.[122]

A third point of similarity that is relevant in the present context is that both Article 101 and 102 TFEU may serve as a basis to claim compensation from the infringer. In a range of leading judgments, the Court has explained

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114 Case 118/85, *Commission v. Italy*, ECLI:EU:C:1987:283, at 7; Joined Cases C-180/98 to C-184/98, *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten*, ECLI:EU:C:2000:428, at 75; Case C-465/99, *Ambulanz Glöckner v. Landkreis Südwestpfalz*, ECLI:EU:C:2001:577, at 19; Case C-327/12, *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture v. SOA Nazionale Costruttori – Organismo di Attestazione*, ECLI:EU:C:2013:827, at 27.

115 Odudu 2009, p. 232; Jones & Sufrin 2016, p. 116.

116 Case T-155/04, *SELEX Sistemi Integrati v. Commission*, ECLI:EU:T:2006:387, at 77.

117 Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron*, ECLI:EU:C:1991:161, at 22; Case T-155/04, *SELEX Sistemi Integrati v. Commission*, ECLI:EU:T:2006:387, at 89.

118 Odudu 2009, p. 231-232. See also Opinion A-G Jacobs, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband and Others v. Ichthyol-Gesellschaft Cordes and Others*, ECLI:EU:C:2003:304, at 28: 'the basic test appears to me to be whether [the activity] could, at least in principle, be carried on by a private undertaking in order to make profits'; and Wendt 2013, p. 91: '(…) the question is whether a particular activity, in principle, can be carried out under market conditions, i.e. by a private actor with a view to profit'.

119 Wendt 2013, p. 91-95, 173; Jones & Sufrin 2016, p. 116, 263, and 595.

120 Wendt 2013, p. 154-155, 173; Jones & Sufrin 2016, p. 171-173, 270-271.

121 E.g. Case 22/71, *Béguelin Import Co. and Others v. S.A.G.L. Import Export and Others*, ECLI:EU:C:1971:113, at 16; Case C-49/07, *MOTOE v. Elliniko Dimosio*, ECLI:EU:C:2008:376, at 41.

122 European Commission Notice, 'Guidelines on the effect on trade concept contained in Arts. 81 and 82 of the Treaty'.

that any person is entitled to claim compensation for losses resulting from an anti-competitive agreement or practice prohibited under Article 101 TFEU.[123] In *Cogeco Communications*, the Court has added that Article 102 TFEU may serve as a basis to claim compensation for the harm suffered as a result of the abuse of a dominant position.[124] The latter judgment confirms that the claimant must satisfy the same set of constitutive conditions, regardless of whether he claims compensation for losses resulting from a collusion or from an abuse of a dominant position.[125]

A fourth point of similarity concerns the rules that are relevant if consumers and customers wish to enforce their claims against one or more undertakings. Several of these rules have been harmonised, as the result of the adoption of Council Regulation (EC) No 1/2003 and of Directive 2014/104/EU.[126] Although the Regulation largely focuses on the cooperation between the competition authorities and the national courts, some of its rules are also relevant in civil proceedings between private parties. The division of the burden of proof, for instance, is subject to the same rules, regardless of whether the case concerns an infringement of Article 101 (1) or of Article 102 TFEU. The burden of proving an infringement 'shall rest on the party or the authority alleging the infringement',[127] and the burden of proving the conditions for applying 'a defence against a finding of an infringement' shall lie with the undertaking or association invoking the benefit of the defence.[128]

The Directive, for its part, also applies equally to claims resulting from an infringement of Article 101 TFEU and to claims resulting from an infringement of Article 102 TFEU. It harmonises several incidental issues such as evidence disclosure, joint and several liability, and the range of available defences. The underlying purpose has been to create a level

123 Case C-453/99, *Courage v. Crehan*, ECLI:EU:C:2001:465, at 26; Joined Cases C-295/04 to C-298/04, *Manfredi and Others*, ECLI:EU:C:2006:461, at 61; Case C-557/12, *Kone and others v. ÖBB-Infrastruktur*, ECLI:EU:C:2014:1317, at 22; Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204, at 26.

124 Case C-637/17, *Cogeco Communications v. Sport TV Portugal and Others*, ECLI:EU:C:2019:263, at 40.

125 Rousseva 2010, p. 443-445, also points out that a 'similar right to damages' exists in both situations. See also Opinion A-G Wahl, Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:100, at 34-45.

126 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

127 Art. 2, Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

128 Recital 5 and Art. 2, Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. See also Recital 39, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, on the burden of proving the passing-on of losses.

playing field for undertakings and to improve the conditions under which consumers can enforce their rights.[129] As a result of the introduction of the Directive, the private enforcement of EU competition law – and in fact, also of national competition law[130] – has become subject to the same harmonised regime.

5.3.4 Differences between Articles 101 and 102 TFEU

In addition to these similarities, there are also differences between Articles 101 and 102 TFEU. It will be recalled that Articles 101 and 102 TFEU focus on different forms of anticompetitive conduct. Whereas the first provision focuses on cooperation between undertakings, the latter provision focuses on unilateral behaviour of one or several undertakings.[131]

It does not come as a surprise, therefore, that the treaty provisions differ considerably in terms of their structure. Under Article 101 TFEU, the starting point is that any agreement, decision and concerted practice which has as its 'object or effect the prevention, restriction or distortion of competition within the internal market' shall be prohibited (paragraph 1) and shall be automatically void (paragraph 2). The Court, for its part, has added that agreements, decisions and practices which have an 'insignificant effect on the markets' fall outside the scope of the prohibition altogether (the *de minimis* doctrine).[132] As such conduct does not 'appreciably' restrict competition under Article 101 (1) TFEU it should only be assessed, if at all, on the basis of the national competition laws.[133] The reader must be aware that the concept of 'appreciability' used here is different from the concept of 'appreciability' used for determining the effect of the anticompetitive conduct on cross-border trade explained in the previous section.[134]

The structure of Article 102 TFEU is different. The starting point is that dominant positions on the market are allowed and that only the abuse of

129 Recitals 9-10, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

130 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union also applies to infringements of national competition laws.

131 Wendt 2013, p. 34 and 36.

132 Case C-226/11, *Expedia v. Autorité de la concurrence and Others*, ECLI:EU:C:2012:795, at 16-17, with references to several judgments, including Case 5/69, *Franz Völk v. Établissements J. Vervaecke*, ECLI:EU:C:1969:35, at 7. See also Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice).

133 Jones & Sufrin 2016, p. 171.

134 Jones & Sufrin 2016, p. 170-177, 235-237.

such positions is forbidden.[135] Dominant undertakings do, however, have a 'special responsibility' not to allow their conduct to impair 'genuine undistorted competition' on the market.[136] Consequently, some actions will be considered permissible if they are committed by a non-dominant undertaking, but abusive if they are committed by one or several dominant undertakings.[137] Indeed, any abuse committed by a dominant undertaking 'is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates'.[138] This means that there is no threshold of 'appreciability' for the purpose of determining whether there is an abuse of a dominant position.[139] Finally, it must be noted that Article 102 TFEU does not declare agreements automatically void. It is subject to debate whether, and in what way, the existence of an abusive practice might affect the validity of any agreements imposed by the dominant undertaking on its customers.[140] According to the Court, this issue should be resolved on the basis of the applicable national law.[141]

Several other differences can be recognised if we examine the provisions from the point of view of the alleged infringer. Once it is established that there is an infringement of Article 101 (1) TFEU, the conduct in question may nonetheless escape scrutiny if it satisfies the four conditions listed in Article 101 (3) TFEU. In order for this exemption to apply, the conduct must (1) improve 'the production or distribution of goods' or promote 'technical or economic progress' and (2) allow consumers 'a fair share of the resulting benefit', provided that it (3) does not impose restrictions 'which are not indispensable to the attainment of these objectives' and (4) does not eliminate competition 'in respect of a substantial part of the products in question'. The application of this derogation requires a balance to be struck between the interests of the undertakings involved and those of the direct and indirect users of the products or services covered by the anti-competitive conduct.[142]

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135 Wendt 2013, p. 336-337. A concentration of two or more previously independent undertakings may nonetheless be prohibited on the basis of the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation).

136 Wendt 2013, p. 342-343.

137 Wendt 2013, p. 342 and 348.

138 Case C-23/14, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2015:651, at 73.

139 But there is a threshold of 'appreciability' for the purpose of determining whether the conduct 'may affect trade between Member States'. This threshold applies in the context of Articles 101 and 102 TFEU. See section 5.3.3.

140 Devroe, Cauffman & Bernitz 2017, p. 90-96, with references.

141 Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 45: '(…) the competent national administrative or judicial authorities must draw the inferences from the applicability of [Article 102 TFEU] and, where appropriate, rule that the agreement in question is void on the basis, in the absence of relevant Community rules, of their national legislation'.

142 Wendt 2013, p. 451-453.

An agreement is considered to satisfy the conditions under Article 101 (3) TFEU if it is covered by a Block Exemption regulation adopted by the Council or the Commission.[143] These regulations aim at improving the efficiency of the decision-making process and at providing legal certainty to firms operating on certain markets. In the view of the Court, they should not be given a broad interpretation. Consequently, an agreement must fall squarely within the scope of the Block Exemption Regulation in order to benefit from the exemption.[144] It must be noted, however, that where the conditions of a block exemption are not satisfied, the agreement may nonetheless benefit from an individual exemption on the basis of Article 101 (3) TFEU, provided, of course, that the alleged infringer relies upon this provision and puts forward sufficient arguments and evidence.[145]

In addition to the system of exemptions based on Article 101 (3) TFEU, the Court has recognised another possibility for exempting anticompetitive conduct, one that allows for a broader enquiry into the objectives served by the conduct in question, and its necessity and proportionality. The first example is the *Wouters* case, which concerned a regulation adopted by the Dutch Bar Association prohibiting multidisciplinary partnerships between members of the Bar and accountants. The Court admitted that the regulation had certain restrictive effects, but concluded nevertheless that Article 101 (1) TFEU had not been violated since the Dutch Bar Association 'could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession'.[146] In subsequent case law, the Court has recognised several objectives which may be relied upon in order to exempt certain restrictive effects, such as the proper conduct of competitive sport,[147] the quality of the services offered by chartered accountants,[148] and the quality of the work of geologists.[149] It has also stressed the importance of verifying

143 E.g. Council Regulation (EC) No 169/2009 applying rules of competition to transport by rail, road and inland waterway; Commission Regulation (EC) No 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia); Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

144 Case C-439/09, *Pierre Fabre Dermo-Cosmétique v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, ECLI:EU:C:2011:649, at 56-57.

145 Case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission*, ECLI:EU:T:2006:265, at 233-236.

146 Case C-309/99, *Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98, at 110.

147 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 42-56.

148 Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência*, ECLI:EU:C:2013:127, at 93-100.

149 Case C-136/12, *Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato and Autorità garante della concorrenza e del mercato v. Consiglio nazionale dei geologi*, ECLI:EU:C:2013:489 at 53-57.

whether the restrictions of competition 'are limited to what is necessary to ensure the implementation of legitimate objectives'.[150]

Unlike Article 101 TFEU, Article 102 TFEU does not contain any written justifications. It may be recalled that the existence of an abuse is already an exception to the general rule that dominant positions are allowed. Apparently, the drafters of the Treaties did not deem it necessary to provide for any further exemptions.[151] The Court has, however, developed a concept of 'objective justification' in order to absolve abusive practices which seek to achieve a legitimate objective. In the words of the Court, it is 'open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under Article [102 TFEU]'.[152] In the same judgment – *Post Danmark I* – the Court mentions two examples: (a) the situation that the conduct is 'objectively necessary', and (b) the situation that the conduct is justified 'by advantages in terms of efficiency that also benefit consumers'.[153]

The conditions for applying the second category of justification defence have been explained by the Court. They show resemblance to,[154] but are not entirely consistent with, the conditions of Article 101 (3) TFEU mentioned above:

> '[With regard to the advantages in terms of efficiency], it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.'[155]

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150 Case C-136/12, *Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato and Autorità garante della concorrenza e del mercato v. Consiglio nazionale dei geologi*, ECLI:EU:C:2013:489, at 54; Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, *API — Anonima Petroli Italiana v. Ministero delle Infrastrutture e dei Trasporti and Ministero dello Sviluppo economico*, ECLI:EU:C:2014:2147, at 48; Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria v. Yordan Kotsev and FrontEx International v. Emil Yanakiev*, ECLI:EU:C:2017:890, at 55. See also Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 54, where the Court determined that 'it does not appear that the restrictions which that threshold [contained in the anti-doping rules] imposes on professional sportsmen go beyond what is necessary in order to ensure that sporting events take place and function properly'.

151 See also Rousseva 2010, p. 22.

152 Case C-209/10, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2012:172, at 40, referring to Case 27/76, *United Brands v. Commission*, ECLI:EU:C:1978:22, at 184; Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission*, ECLI:EU:C:1995:98, at 54-55; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige*, ECLI:EU:C:2011:83, at 31 and 75.

153 Case C-209/10, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2012:172, at 41.

154 As noted by Nazzini 2011, p. 305.

155 Case C-209/10, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2012:172, at 42; Case C-23/14, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2015:651, at 49.

It is less clear which test should be applied when assessing the first category of justification defence mentioned by the Court in *Post Danmark I*. When is the abuse of a dominant position 'objectively necessary'? Some writers suggest that a *Wouters*-like proportionality test also applies in the context of Article 102 TFEU.[156] At the same time, it appears that dominant undertakings have less room for manoeuvre. In its rare case law on the matter, the Court has emphasised that, in principle, it is up to the public authorities, and not to dominant undertakings, to eliminate products from the market because of health or safety concerns.[157] This suggests that it is more difficult to justify an abuse of a dominant position than it is to justify a concerted practice.[158] Such an approach makes sense, as it takes into account the special responsibility dominant undertakings have, given their position of economic strength on the market.

5.3.5 Concurrence of Articles 101 and 102 TFEU?

The existence of difference prompts the question of whether the same situation may fall within the scope of Article 101 and Article 102 TFEU. Is it conceivable that an undertaking has violated Article 101 TFEU, because it has collaborated with other competitors, and has also violated Article 102 TFEU, because it has abused its dominant position on the market? This question may not only arise in proceedings between private individuals,[159] but also in proceedings between alleged infringers and competition authorities. For this reason, we should not only pay attention to preliminary rulings, but also to judgments in administrative proceedings between alleged infringers and the European Commission. Do the General Court and the Court of Justice of the European Union permit a choice between Article 101 and Article 102 TFEU as a basis for establishing anticompetitive conduct?

The case *Hoffmann-La Roche* is important in this regard. Hoffmann-La Roche had concluded so-called 'fidelity agreements' with its purchasers. In order to enjoy a fidelity rebate the purchasers had to buy all or most of their requirements exclusively, or in preference, from Hoffmann-La Roche. The Commission found that Hoffmann-La Roche had abused its dominant position on the relevant markets by imposing these terms on its

156 E.g. Rousseva 2010, p. 268; Mataija 2016, p. 96.

157 As observed in Case T-30/89, *Hilti AG v. Commission*, ECLI:EU:T:1991:70, at 118; Case C-333/94 P, *Tetra Pak International v. Commission*, ECLI:EU:C:1996:436, at 36.

158 In a similar vein, see Monti 2007, p. 203; Lianos 2009, p. 28-29; Jones & Sufrin 2016, p. 370.

159 According to Art. 6 and Recitals 7 and 21 of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, national courts have the power to apply the entirety of Articles 101 and 102 TFEU, also when deciding disputes between private individuals. No prior finding of an infringement is necessary (see also Case C-595/17, *Apple Sales International and Others v. MJA*, ECLI:EU:C:2018:854, at 35).

purchasers. Before the Court of Justice, the question was raised whether the fidelity agreements might also fall within the scope of Article 101 TFEU and whether this would exclude Article 102 TFEU as a legal basis for fining the company. The Court held that:

> '(...) the fact that agreements of this kind might fall within Article [101 TFEU] and in particular within paragraph (3) thereof does not preclude the application of Article [102 TFEU], since this latter article is expressly aimed in fact at situations which clearly originate in contractual relations so that in such cases the Commission is entitled, taking into account the nature of the reciprocal undertakings entered into and to the competitive position of the various contracting parties on the market or markets in which they operate to proceed on the basis of Article [101] or Article [102].'[160]

In the view of the Court, the treaty provisions are not mutually exclusive, but complementary. Consequently, the Commission may elect to proceed on the basis of Article 101 or on the basis of Article 102 TFEU, or – it must be added – on the basis of both provisions.

The case *Ahmed Saeed* provides support for this conclusion. The *Bundesgerichtshof* asked the Court according to which criteria it should review price fixing agreements concluded between air carriers. The Court first determined under what conditions such agreements are void on the basis of Article 101 (2) TFEU.[161] The Court then spelled out the criteria according to which the national court should apply Article 102 TFEU to the case at hand.[162] Clearly, the Court was not prepared to exclude the possibility that one of the air carriers might actually have imposed the tariffs on its competitors. In the words of the Court, it 'cannot be ruled out' that Articles 101 and 102 TFEU 'may both be applicable'.[163] The Court also explicitly rejected the argument, put forward by the Commission and by the United Kingdom, that the assessment under Article 102 TFEU should be substantially similar to the one carried out under Article 101 TFEU. At least one important difference exists between the rules, the Court noted: whereas a concerted practice may qualify for exemption under Article 101 (3) TFEU, 'no exemption may

160 Case 85/76, *Hoffmann-La Roche v. Commission*, ECLI:EU:C:1979:36, at 116.

161 Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 19-29.

162 Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 38-46.

163 Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 37. In a similar vein: Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line and others v. Commission*, ECLI:EU:T:2003:245, at 610; Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 33 and 130; Case T-65/98, *Van den Bergh Foods v. Commission*, ECLI:EU:T:2003:281, at 153; Case T-712/14, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, ECLI:EU:T:2017:748, at 94.

be granted, in any manner whatsoever, in respect of abuse of a dominant position'.[164]

Several other examples demonstrate that the Union Courts recognise that the treaty provisions might apply concurrently, but are careful not to conflate the legal tests. According to the General Court, the treaty provisions seek to achieve the same objective – maintaining effective competition within the internal market – but nonetheless constitute 'two independent legal instruments addressing different situations'.[165] The existence of an agreement, a decision of an association of undertakings or a concerted practice is neither necessary nor sufficient to establish a dominant position under Article 102 TFEU.[166] The Commission may not, therefore, 'recycle' the facts constituting a violation of Article 101 TFEU in order to establish a violation of Article 102 TFEU.[167] The converse is true as well. The fact that certain conduct is permissible under Article 101 TFEU does not mean that the same conduct is also permissible under Article 102 TFEU.[168]

This does not mean that the existence of an agreement, a decision of an association of undertakings or a concerted practice should be disregarded when interpreting Article 102 TFEU. The nature and terms of an agreement may support the conclusion that a collective dominant position exists:

> 'The existence of a collective dominant position may (…) flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question.'[169]

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164 Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 32; repeated in Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line and others v. Commission*, ECLI:EU:T:2003:245, at 1112.

165 Case T-51/89, *Tetra Pak Rausing v. Commission*, ECLI:EU:T:1990:41, at 22. See also Case 6/72, *Europemballage Corporation and Continental Can Company v. Commission*, ECLI:EU:C:1973:22, at 25: 'Articles [101] and [102] seek to achieve the same aim on different levels (…)'; Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 33: 'the objectives pursued by each of those two provisions must be distinguished'.

166 Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 43 and 45; Case C-413/06 P, *Bertelsmann and Sony Corporation of America v. Commission*, ECLI:EU:C:2008:392, at 119.

167 Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro and Others v. Commission ('Flat Glass')*, ECLI:EU:T:1992:38, at 360.

168 Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 131; Case T-712/14, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, ECLI:EU:T:2017:748, at 94.

169 Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 45.

Likewise, the fact that certain conduct does *not* have anticompetitive effects under Article 101 (1) TFEU can be an 'indication' that the same conduct does *not* constitute a violation of Article 102 TFEU either.[170] At the end of the day, the outcome might not be different, because the content of one competition rule might affect the content of the other competition rule. However, it must be stressed that such an outcome can only be reached through an interpretation of each individual competition rule, given the fact that the Court is clearly not prepared to conclude that Article 101 TFEU subsumes Article 102 TFEU, or *vice versa*.[171]

5.3.6 Interim conclusion

The foregoing analysis has demonstrated that the same set of facts may fall within the scope of application of both Article 101 and Article 102 TFEU. In other words, it is possible to engage in an anticompetitive concerted practice and also abuse a dominant position on the market. The dividing line between these two situations becomes particularly thin in the event of anticompetitive contractual arrangements entered into by undertakings which together hold a dominant position on the relevant market.[172] In such situations, both treaty provisions may have been violated. It flows from this reasoning that the aggrieved party may have a good claim for compensation with respect to any of the infringements, provided that there is a causal relationship between the infringement in question and the harm suffered. It is fair to assume, then, that this party will have a choice to claim compensation for any of the infringements, subject to a prohibition of double recovery for the same losses.

This does not mean that one applicable competition rule cannot impact upon the interpretation of another applicable competition rule. In fact, we have seen some convergence in the interpretation of the separate treaty texts. For instance, similar arguments run through the written and unwritten justification defences which may be relied upon in order to challenge the finding that either Article 101 or Article 102 TFEU has been violated.[173] Meanwhile, it is clear that the provisions cannot be wholly equated. In principle, the Union Courts consider each competition rule on its own merits and do not exclude one of them from the outset. Articles 101 and 102 TFEU are not mutually exclusive, but complementary.

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170 Case T-712/14, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, ECLI:EU:T:2017:748, at 96.

171 Cf. Wendt 2013, p. 386.

172 E.g. in Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro and Others v. Commission ('Flat Glass')*, ECLI:EU:T:1992:38, in Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, and in Case T-712/14, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, ECLI:EU:T:2017:748, the Commission considered that the same behavior constituted a concerted practice as well as an abuse of a collective dominant position.

173 Mataija 2016, p. 102-103.

5.4 Articles 101 and 102 TFEU and free movement law

5.4.1 Introduction

The third topic is situated at the crossroads of the previous two topics. Having examined competition laws and free movement laws, this section will consider the interface between them. It will be recalled that anticompetitive conduct of private undertakings is governed by Articles 101 and 102 TFEU. We have also seen that several free movement rules – although traditionally associated with controlling Member States' behaviour – govern certain actions of individuals.[174]

This subsection examines whether these regimes may be applicable to a single set of facts. Are private parties, for instance, obliged to comply with both sets of rules if they impose their terms and conditions on market players? And if that is the case, may the interested party then rely upon the rule of his choice, for instance when claiming compensation for the losses sustained, notwithstanding the applicability of another treaty provision? Before analysing the case law of the Court (subsection 5.4.4), we will take a step back and examine the most important similarities and differences between the competition laws and free movement laws at issue (subsections 5.4.2-5.4.3).

5.4.2 Similarities and differences between the provisions

At the very outset, it must be noted that both the free movement provisions and the competition rules are aimed at establishing the internal market and ensuring its proper functioning.[175] Their overall objective is to create and maintain 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.[176] Protecting individuals against restrictions on their free movement rights is a necessary first step in order to achieve this objective. But removing such restrictions will not be enough to ensure a proper functioning of the internal market. Even if access to a particular market is secured, economic activity can still be hindered when undertakings or associations of undertakings restrict or prevent competition on that market.[177]

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174 Mortelmans 2001, p. 781-803, has called this development the 'privatisation' of free movement law. A comparable development has taken place in the field of competition law. Under certain circumstances, these rules – although addressed to undertakings – can also be applied to Member States' behavior. This development – the 'publicisation' of competition – will not be dealt with in detail here, given the focus of this book on the relationships between individuals.

175 Which is one of the aims of the Union, according to Art. 3 (3) TEU.

176 As expressed in Art. 26 (2) TFEU.

177 Swaak & Van der Woude 2018, p. 715.

For this reason, the internal market also 'includes a system ensuring that competition is not distorted'. This statement, laid down in one of the Protocols annexed to the TFEU, underlines that free movement law and competition law are complementary counterparts.[178] The Court has also emphasised that both regimes contribute to achieving the same ultimate goal: to accomplish economic integration and even to contribute to the process of creating an ever closer union among the peoples of Europe.[179] Against this background, scholarship stresses that the two regimes are part of a 'seamless web' promoting cross-border competition.[180]

However, the two sets of rules cannot be fully understood by reference to one overarching principle of free trade and competition only. Both regimes also pursue their own particular aims.[181] Free movement law is traditionally directed at the conduct of public authorities and involves general interests. It targets restrictive measures and scrutinises the proportionality of these measures. By contrast, competition law is traditionally directed at the conduct of private undertakings and associations of private undertakings who pursue their own interests. It focuses on the economic effects of the conduct of these undertakings and associations on the state of competition on a particular market. The underlying objective is to promote the efficient operation of these markets.[182]

The differences between the two regimes come to light when we examine the criteria according to which a restriction of either free movement or competition must be established.[183] Under Article 101 (1) TFEU, it is necessary to analyse the economic and legal context in which the agreements or practices occur and to assess their actual and potential effects on competition on the relevant market.[184] Likewise, Article 102 TFEU requires the person alleging a breach to define the relevant market and to assess the economic position of the undertaking or undertakings on this market.[185]

178 Protocol No. 27 on the internal market and competition. A similar conclusion is drawn by Baquero Cruz 2002, p. 90; Krenn 2012, p. 204; Mataija 2016, p. 116-117.

179 This connection is made by the Court in its Opinion 1/91, at 17-18. The Court has also remarked that Art. 101 TFEU 'constitutes a fundamental provision which is essential (…) for the functioning of the internal market' (in Case C-126/97, *Eco Swiss China Time v. Benetton International*, ECLI:EU:C:1999:269, at 36; Case C-453/99, *Courage v. Crehan*, ECLI:EU:C:2001:465, at 20).

180 See especially Gyselen 1996, p. 242; Mortelmans 2001, p. 622. See also Prechal & De Vries 2009, p. 5-24; Mataija 2016, p. 116-119.

181 Baquero Cruz 2002, p. 90-91.

182 Mataija 2016, p. 119-120.

183 Mortelmans 2001, p. 630-632, and Mataija 2016, p. 144.

184 Case C-345/14, *SIA 'Maxima Latvija' v. Konkurences padome*, ECLI:EU:C:2015:784, at 26-30, with references to earlier judgments, and especially to Case C-234/89, *Stergios Delimitis v. Henninger Bräu*, ECLI:EU:C:1991:91, at 15-26.

185 Case 27/76, *United Brands v. Commission*, ECLI:EU:C:1978:22, at 65.

By contrast, economic analysis does not play an important role in the field of free movement.[186] Unlike the competition rules, which require that the effect of the anticompetitive conduct on cross-border trade is 'appreciable' in economic terms,[187] the free movement provisions prohibit *any* restriction that is liable to prevent or hinder access to the market in respect of persons who have sought to exercise their rights of free movement.[188]

The same difference can be seen if we adopt the perspective of the defendant.[189] If the aggrieved party alleges a restriction of free movement, the defendant may respond that the restriction served a legitimate objective, such as public policy, public security or public health,[190] the protection of fundamental rights,[191] or some other objective of 'general interest',[192] and that the means chosen were necessary and appropriate for attaining the stated objective.[193] Again, economic analysis does not play an important role in this context. In fact, it is settled case-law that restrictions to free movement cannot be justified by objectives of a 'purely economic nature'.[194] The underlying idea is that economic concerns of Member States should not stand in the way of the realisation of the internal market.[195] By contrast, the competition rules typically allow for purely economic justifications, such as

186 Mortelmans 2001, p. 636-637.
187 See *supra* section 5.3.3.
188 See *supra* section 5.2.2.
189 Mortelmans 2001, p. 635-645.
190 See, with regard to the free movement of workers, explicitly Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 86; Case C-350/96, *Clean Car Autoservice GmbH v. Landeshauptmann von Wien*, ECLI:EU:C:1998:205, at 24. The exceptions, and their interpretation, may differ depending on the fundamental freedom at issue.
191 Such as the right to take collective action for the protection of workers: Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 77; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 103.
192 Such as the recruitment and training of young players (Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 106; Case C-325/08, *Olympique Lyonnais v. Olivier Bernard and Newcastle United*, ECLI:EU:C:2010:143, at 39).
193 See e.g. Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*, ECLI:EU:C:1993:125, at 32; Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, at 37; Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 104; Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 75.
194 See already Case 7/61, *Commission v. Italy*, ECLI:EU:C:1961:31, where the Court held that quantitative restrictions on importation can only be justified by 'eventualities of a non-economic kind'. See also Case C-109/04, *Karl Robert Kranemann v. Land Nordrhein-Westfalen*, ECLI:EU:C:2005:187, at 34; Joined Cases C-52/16 and C-113/16, *SEGRO* (C-52/16) *and Günther Horváth* (C-113/16), ECLI:EU:C:2018:157, at 123.
195 See e.g. Babayev 2016, p. 992.

the existence of efficiency advantages that benefit the consumer[196] and the protection of legitimate business interests.[197]

The approach followed under free movement law has, it is true, softened over the years. Even though the Court is clearly not prepared to depart openly from the principle that purely economic reasons cannot justify a restriction of a fundamental freedom, the Court does accept certain economic reasons as justifications, provided that they serve the achievement of a non-economic objective in the public interest. It must be noted, however, that this path towards justification is straight and narrow. It is generally reserved to public authorities who wish to maintain the financial balance of a particular national security system.[198] The statements issued by the Court should, moreover, be treated with 'circumspection', as Advocate General Jacobs has argued.[199] They contain a 'double derogation', as they derogate both from the prohibitions and from the exceptions written down in the free movement provisions.[200]

It is nonetheless arguable that some public interest justifications which have been expressly recognised by the Court are essentially based on economic considerations.[201] In *Bosman*, for instance, the Court admitted that transfer rules may be justified by the objective of maintaining a financial and competitive balance between football clubs.[202] However, it must be observed that the Court was ultimately motivated not by purely economic reasons but by the 'considerable social importance of sporting activities and in particular football in the Community'.[203] Such cases do not, therefore, appear to have altered the default position adopted within the fabric of free movement law, namely that economic reasons can only be advanced as justifications if they serve the achievement of a non-economic objective in the public interest.

196 See Art. 101 (3) TFEU and, in the context of Art. 102 TFEU, Case C-95/04 P, *British Airways v. Commission*, ECLI:EU:C:2007:166, at 85-86; Case C-209/10, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2012:172, at 40-41).

197 In the context of Art. 102 TFEU: Case 27/76, *United Brands v. Commission*, ECLI:EU:C:1978:22, at 189-190; Opinion A-G Colomer, Joined Cases C-468/06 to C-478/06, *Sot. Lélos kai Sia and Others v. GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE*, ECLI:EU:C:2008:180, at 99-105.

198 See e.g. Case C-158/96, *Raymond Kohll v. Union des Caisses de Maladie*, ECLI:EU:C:1998:171.

199 Opinion A-G Jacobs, Case C-147/03, *Commission v. Austria*, ECLI:EU:C:2005:40, at 31.

200 See also Opinion A-G Sharpston, Case C-73/08, *Nicolas Bressol and Others v. Gouvernement de la Communauté française*, ECLI:EU:C:2009:396, at 92.

201 Barnard 2009, p. 280.

202 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 105-107.

203 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 106.

Has this position been changed since the Charter of Fundamental Rights has been endowed with binding force? Indeed, some writers have suggested that the Charter creates more room for private parties to advance economic reasons as justifications. They argue that Article 16 of the Charter, which protects the freedom to conduct a business, may serve as a counter mechanism to the fundamental freedoms.[204] It remains to be seen, however, to what extent the freedom to conduct a business may effectively be relied upon in order to justify a restriction of a free movement right. Surely not every economic interest will be protected as a fundamental right under Article 16 of the Charter. The Court, for its part, has chosen to assess the relationship between fundamental freedoms and fundamental rights within the framework of the free movement provisions.[205] In spite of Article 16 of the Charter, it is quite unlikely, therefore, that the Court will confirm that restrictions of free movement rights can generally be justified by economic arguments.

What about competition law? Here too, it seems that the approach has softened over the years. It will be recalled that the Court has recognised several objectives of general interest which may be relied upon in order to exempt certain effects restrictive of Article 101 (1) TFEU that are inherent in the pursuit of a legitimate objective in the general interest.[206] In fact, *Meca-Medina and Majcen* confirms that such objectives cannot be purely economic in nature. Responding to the argument raised by Meca-Medina and Majcen that the anti-doping rules at issue also protected the economic interests of the International Olympic Committee and could not, therefore, be regarded as inherent in the proper conduct of competitive sport, the Court confirmed that the rules could only be exempted if their restrictive effects did not go beyond what is necessary in order to ensure that legitimate objective in the general interest.[207] We have seen, moreover, that a broader enquiry into the objectives served by the anti-competitive conduct in question, and its necessity and proportionality, is also possible in the context of Article 102 TFEU.[208]

Still, the question can be raised whether the acceptance of these exemptions has really caused competition law to drift away from its core objective, which is to promote the efficient operation of the internal market. It is telling, in this regard, that some writers have sought to reformulate the unwritten exemptions introduced by the Court in terms of the written treaty provisions. Wendt, for instance, argues that non-market objectives can and

204 See e.g. Babayev 2016, p. 997-1005.

205 See e.g. Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 77-90; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 90-111.

206 See *supra* section 5.3.4.

207 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 47, responding to the argument raised by the appellants that the anti-doping rules also protected the economic interests of the International Olympic Committee.

208 See *supra* section 5.3.4.

should be taken into account either under Article 101 (3) TFEU, to the extent that the anti-competitive conduct yields economically beneficial effects for consumers,[209] or under Article 106 (2) TFEU, which provides for a general justification avenue in respect of services in the general interest.[210] Such statements show that economic considerations are still central to competition law, just as non-economic considerations are still at the heart of free movement law.

A final point of divergence between the two regimes is important to consider in the present context. It may be recalled that the infringement of both Article 101 and Article 102 TFEU entitles the aggrieved party to claim compensation, directly on the basis of Union law, provided that there is a causal relationship between the harm suffered and the infringement.[211] The Union legislature has also harmonised the rules on issues such as evidence disclosure, joint and several liability, and the range of available defences in the field of competition law.[212] Such an enforcement regime does not exist in the field of free movement law. As the case law stands, it will be up to national law to provide the aggrieved party with a claim for compensation, subject only to compliance with the requirements of equivalence and effectiveness.[213]

5.4.3 Concurrence of competition law and free movement law?

For the reasons stated above, the aggrieved party may or may not prefer to proceed on the basis of competition law rather than on the basis of free movement law.[214] The question to consider is whether the law permits such a choice. May the aggrieved party plead that the other party has violated free movement law if the conduct at issue is also governed by one or more competition rules? Will the argument raised by the defendant that the competition rules govern the case exclusively be successful? As the treaty provisions themselves do not provide any guidance, we will have to analyse the case law. Do the Union Courts recognise the possibility that free movement law and competition law may be applicable concurrently to a single set of facts?

In principle, the Court examines each rule on its own terms. Consider *Meca-Medina* as an example. In this case about the compatibility of anti-doping rules with the rules on competition and the freedom to provide services, the Court stressed that sport is only subject to Union law 'in so

209 Wendt 2013, p. 451-519.
210 Wendt 2013, p. 519-546.
211 *Supra* section 4.3.
212 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.
213 *Supra* section 4.3.
214 Mataija 2016, p. 149-150.

far as it constitutes an economic activity'.[215] The Court then pointed out that free movement law only applies if the activity 'takes the form of gainful employment or the provision of services for remuneration',[216] and does not apply to 'rules concerning questions which are of purely sporting interest'.[217] At the same time, the Court underlined that the mere fact that the rules fall outside the scope of free movement law does not mean that they also fall outside the scope of the other treaty provisions.[218] According to the Court, sporting rules must satisfy all the relevant requirements flowing from the rules relating to the freedom of movement for workers, the freedom to provide services, and competition.[219] If the rights to free movement have not been restricted, competition law may still apply:

> '(…) even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity (…), that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles [101 and 102 TFEU] nor that the rules do not satisfy the specific requirements of those articles.'[220]

So, the mere fact that an activity is not governed by free movement law does not mean that competition law does not apply. This approach is in line with earlier judgments, in which the Court confirmed that transport activities are governed by competition law, even though such activities are not subject to the general rules relating to the freedom to provide services, because of the derogation provided for in Article 58 (1) TFEU.[221]

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215 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 22, with references to Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140, at 4; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115, at 12; Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 73; Joined Cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL and others*, ECLI:EU:C:2000:199, at 41; Case C-176/96, *Jyri Lehtonen and Castors Braine v. FRBSB*, ECLI:EU:C:2000:201, at 32.

216 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 23.

217 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 25.

218 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 26-28.

219 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 29-30.

220 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 31. Along the same lines: Case T-144/99, *Institute of Professional Representatives before the European Patent Office v. European Commission*, ECLI:EU:T:2001:105, at 66-67; Case C-49/07, *MOTOE v. Elliniko Dimosio*, ECLI:EU:C:2008:376, at 22; Case T-23/09, *Conseil national de l'Ordre des pharmaciens (CNOP), Conseil central de la section G de l'Ordre national des pharmaciens (CCG) v. European Commission*, ECLI:EU:T:2010:452, at 81.

221 Joined Cases 209/84 to 213/84, *Asjes and Others*, ECLI:EU:C:1986:188, at 40-45; Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 5. See *supra* section 5.2.4.

The converse is true as well. The fact that a situation escapes competition law scrutiny does not mean that the same situation also falls outside the scope of free movement law. Take *Viking Line* as an illustration. This Finnish ferry operator sought to reflag one of its vessels – the loss-making *Rosella* – to Estonia, so as to take advantage of the possibility of concluding a new collective bargaining agreement. During legal proceedings, the question was raised whether a strike called by the trade unions would unlawfully restrict the freedom of establishment of the ferry operator. Before the Court, the trade unions relied on the *Albany* case, in which the Court had held that collective bargaining agreements fall outside the scope of Article 101 TFEU because they pursue important social policy objectives.[222] The trade unions argued that the same exception should be made for collective actions in the context of the freedom of establishment and the freedom to provide services. The Court did not buy this argument:

> '[T]he fact that an agreement or an activity are [sic] excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances (…).'[223]

Once again, these examples illustrate that, in the absence of express derogations, situations falling within the scope of Union law are governed by all the requirements resulting from free movement law and from competition law. It flows from this reasoning that the same situation might fall both within the scope of free movement law and within the scope of competition law.[224] This conclusion was drawn by A-G Lenz in the *Bosman* case:

> 'No reason can be seen why the rules at issue in this case [the transfer rules and nationality clauses adopted by the football associations, RdG] should not be subject both to Article [45 TFEU] and to [EU] competition law. The [TFEU] at various places regulates the inter-relationship of the various fields in which its provi-

222 Case C-67/96, *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430, at 59-60.

223 Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 53, referring to Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492. Along the same lines: Case C-271/08, *Commission v. Germany*, ECLI:EU:C:2010:426, at 46-48.

224 E.g. Baquero Cruz 1999, p. 619: '(…) their joint application should not be seen as a systemic misconstruction (…), but rather as the natural effect of their overlapping and yet autonomous fields of application'; Krenn 2012, p. 205: '(…) in fact the Court applies competition law and fundamental freedoms cumulatively'; Mataija 2016, p. 127: '(…) it is possible that the same conduct is subject to and infringes both the competition and free movement rules'.

> sions apply. For Article [45] on the one hand and Article [101] et seq. on the other hand there is no such provision, so that in principle both sets of rules may be applicable to a single factual situation.'[225]

Having examined both regimes in detail, A-G Lenz found that the rules adopted by national and international football associations did not only restrict the right to free movement of workers, but also violated the current Article 101 TFEU.[226] The Court, for its part, decided not to deal with the competition provisions in detail. Having concluded that the football associations had violated the right to free movement of workers, the Court did not find it necessary to embark upon an examination of today's Articles 101 and 102 TFEU:

> 'Since both types of rule [the transfer rules and nationality clauses adopted by the football associations, RdG] to which the national court's question refer [sic] are contrary to Article [45 TFEU], it is not necessary to rule on the interpretation of Articles [101 and 102 TFEU].'[227]

This was not an isolated incident.[228] On occasion, the Court has also decided to skip the analysis of the free movement provisions after having examined the conduct on the basis of the relevant competition rules.[229] This approach is surprising, given the Court's own position that the two sets of rules are to be distinguished.

This is not to say that the outcome will necessarily be different, depending on whether the case is assessed on the basis of free movement law or on the basis of competition law. Indeed, it has been argued that the two sets of rules should be interpreted harmoniously. A-G Lenz, for instance, argued that a 'uniform result' should be reached in *Bosman*.[230] The same approach has been advanced by A-G Kokott, who submitted that 'conflicting assessments of the fundamental freedoms and competition law are to be avoided in principle'.[231] Consider also the position of Weatherill, who has argued that 'there is and should be an ultimate functional

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225 Opinion A-G Lenz, Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:293, at 253.

226 Opinion A-G Lenz, Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:293, at 287.

227 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 138.

228 Mortelmans 2001, p. 640-641; Van den Bogaert 2005, p. 194-198; Mataija 2016, p. 128-130.

229 Case C-309/99, *Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98, at 119-123; Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, *API — Anonima Petroli Italiana v. Ministero delle Infrastrutture e dei Trasporti and Ministero dello Sviluppo economico*, ECLI:EU:C:2014:2147, at 59.

230 Opinion A-G Lenz, Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:293, at 278.

231 Opinion A-G Kokott, Cases C-403/08 and C-429/08, *Football Association Premier League and Others v. QC Leisure and Others*, ECLI:EU:C:2011:43, at 249.

comparability between the inquiries conducted under these economic law provisions'.[232] To some extent, this approach has been followed by the Court. As the previous section has demonstrated, both free movement law and competition law nowadays take account of factors other than those expressly mentioned in the relevant treaty provisions. There clearly is some convergence in the interpretation of the two sets of rules.

However, the previous section has also demonstrated that free movement law and competition law cannot be wholly equated. Differences between them continue to exist. What is more, the Court itself has occasionally refused to answer preliminary questions concerning the interpretation of competition law, because a lack of sufficient factual and legal information, but has nonetheless chosen to answer the preliminary questions concerning the interpretation of free movement law asked by the same court.[233] Against this background, it is submitted that it is unwelcome if the Court skips the analysis of one of the applicable treaty provisions if it does have sufficient factual and legal information available. After all, it cannot be ruled out that the application of the treaty provisions may lead to different outcomes. In any event, the Court's own position that free movement law and competition law are complementary implies that a convergence in outcome can only be reached through an interpretation of each set of rules, and only to the extent that the outcome can be accommodated within that framework, having regard to the underlying objectives of free movement law and competition law respectively.

5.4.4 Interim conclusion

This subsection has considered the interface between the laws of competition and free movement. It has discussed the similarities and differences between these regimes and has examined whether they may be applicable to the same set of facts. Even though the Court has acknowledged that both regimes contribute to achieving similar objectives, and in spite of the fact that both regimes take account of factors other than those expressly mentioned in the underlying treaty provisions, differences between them continue to exist. For this reason, it might be preferable for the aggrieved party to proceed on the basis of either competition law or free movement law. In view of the principled position taken by the Court, which is that the

232 Weatherill 2013, p. 414.

233 Joined Cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL and others*, ECLI:EU:C:2000:199, at 28-40; Case C-176/96, *Jyri Lehtonen and Castors Braine v. FRBSB*, ECLI:EU:C:2000:201, at 22-29; Case C-134/03, *Viacom Outdoor v. Giotto Immobilier SARL*, ECLI:EU:C:2005:9421-33; Case C-380/05, *Centro Europa 7 v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni, Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, ECLI:EU:C:2008:59, at 57-71; Case C-384/08, *Attanasio Group v. Comune di Carbognano*, ECLI:EU:C:2010:133, at 32-35; Case C-234/12, *Sky Italia v. Autorità per le Garanzie nelle Comunicazioni*, ECLI:EU:C:2013:496, at 30-33.

regimes are not mutually exclusive but complementary, it is submitted that the interested party may indeed rely upon the rule of his choice, notwithstanding the applicability of another treaty provision. As there exists no order of priority between free movement law and competition law, any convergence in outcome must be reached through an interpretation of the rule at issue, and can only be attained to the extent that such an outcome can be accommodated within the framework governing free movement and competition respectively.

5.5 Conclusion

This chapter has examined how the Union Courts approach situations of concurrence of rules belonging to the body of primary Union law. It has discussed the relationship between equal treatment and free movement rules, between competition rules, and between free movement and competition rules respectively. Having discussed their similarities and differences, each section has considered the question of whether, if at all, Union law permits the aggrieved party to rely upon the rule of his choice, notwithstanding the applicability of another treaty provision.

The analysis of the case law demonstrates that the Union Courts have chosen familiar solutions when dealing with overlaps between rules belonging to the body of primary Union law. They assume that each rule must be considered on its own merits and that no rule should be excluded in advance. In the absence of express derogations, situations falling within the scope of Union law are governed by all the requirements resulting from the treaty provisions governing non-discrimination, free movement, and competition law respectively. The applicability of one treaty provision does not, in principle, affect the scope of application of another treaty provision. In fact, the Union Courts assume that each rule ought to have its intended legal effect if the necessary elements have been established. It flows from this reasoning that concurrently applicable rules may, in principle, be applied cumulatively, so as to realise the objectives underlying each rule to the greatest possible extent.

The fact that each applicable rule should be considered on its own terms does not mean that one rule cannot impact upon the interpretation of another rule. In fact, we have seen some convergence in the interpretation of the different sets of rules. For instance, similar arguments run through the written and unwritten justification defences which may be relied upon in order to challenge the finding that either Article 101 or Article 102 TFEU has been violated. Likewise, both free movement law and competition law nowadays takes account of factors other than those expressly mentioned in the treaty provisions themselves. This does bring the sets of rules closer together. Meanwhile, it is clear that the Union Courts are careful not to exclude one of the rules from the outset. The violation of one provision does not imply the violation of another provision. Likewise, the permissibility

of certain conduct under one branch of primary Union law does not imply that the same conduct must also be considered permissible under another branch of primary Union law. As the rules continue to exist side by side, any convergence between them must be realised through interpretation, to the extent that each separate rule accommodates a convergence in outcome.

Although concurrence is principally allowed, an exception must be made when the treaty provisions dictate that one of the rules applies exclusively. This chapter has examined one such example, namely the relationship between the general prohibition of discrimination on grounds of nationality and the free movement provisions governing persons and services. Importantly, the analysis has demonstrated that the general prohibition of discrimination on grounds of nationality does not embrace all the cases falling within the scope of the free movement provisions. This chapter has submitted that it is impossible, therefore, to maintain the view that a violation of one of the free movement rights automatically and inevitably constitutes a violation of Article 18 TFEU. Nor can it be said that the absence of a violation of one of the free movement rights necessarily implies that Article 18 TFEU has not been violated either. Consequently, we should proceed with caution if we want to use the principle *lex specialis derogat legi generali* in order to find the appropriate answers. As soon as the facts do fall within the scope of application of one of the free movement provisions, however, the Court tends to assess the case only in the light of these provisions. To that extent, the scope of application of Article 18 TFEU is affected by the free movement provisions.

The next chapter shifts the attention to the body of secondary Union law. It examines the relationship between Union rules contained in directives and regulations, and their relationship to the applicable national law. Can we see the same principles at work when we analyse the statements made by the Union legislature and by the Court of Justice of the European Union?

6 Concurrence in Secondary Union Law

6.1 Introduction

The previous chapter has focused on rules belonging to the body of primary Union law. It has discussed the overlap of, and the relationship between, treaty provisions pertaining to competition, equal treatment and free movement respectively. The current chapter shifts the attention to the rules belonging to the body of secondary Union law. It will focus on the directives and regulations by which the Union legislature seeks to regulate the internal market.[1] We have seen that these measures provide individuals with a range of claims, powers, and defences.[2]

By their very nature, these directives and regulations are limited in scope. Most of them govern areas in which the Union shares its competence to legislate with the Member States: social policy, consumer protection, transport, the area of freedom, security and justice, public health matters, and the internal market more broadly.[3] This means that a Member State may legislate to the extent that the Union has not exercised its competence to legislate, or has stopped doing so.[4] It also means that the exercise by the Union of its competence to legislate is curbed by the principles of subsidiarity and proportionality.[5] In accordance with the principle of subsidiarity, the Union may take action 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States'.[6] In accordance with the principle of proportionality, any action 'shall not exceed what is necessary to achieve the objectives of the Treaties'.[7]

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1 See Art. 26 TFEU and the provisions creating specific requirements for legislative interventions, such as Art. 114 TFEU.

2 See *supra* section 4.4.

3 Art. 4 (2) TFEU. But note that the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union has been adopted on the basis of Art. 103 (competition law) and 114 (internal market) TFEU. In the area of competition law, the Union has *exclusive* competence (Art. 3 (1) (b) TFEU). This means that Member States may only legislate 'if so empowered by the Union or for the implementation of Union acts' (Art. 2 (1) TFEU).

4 Art. 2 (2) TFEU.

5 See the report of the Report of the Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently" 2018.

6 Art. 5 (3) TEU. This principle does not apply in areas falling within the exclusive competence of the Union, such as the area of competition law.

7 Art. 5 (4) TEU. This principle also applies in areas falling within the exclusive competence of the Union, such as the area of competition law.

For these reasons, the directives and regulations which will be discussed in this chapter cannot be wholly autonomous and self-contained. They will overlap with other directives and regulations, and they will by complemented by national laws. A single set of facts may, therefore, fall within the ambit of multiple rules, originating from the body of secondary Union law and from other sources of law. The question to consider is whether the scope of application of one rule is affected by the scope of application of another rule. To what extent, if at all, does one rule exclude the applicability of another rule?

This chapter examines how Union law answers these questions by looking closely at the statements made by the Union legislature and by the Court of Justice of the European Union. It purports to demonstrate that we should start from the premise that each rule, however founded, should be realised to the greatest possible extent. By discussing a range of examples, the chapter shows that the scope of application of one rule should only be affected by another rule if this is in accordance with the intentions of the Union legislature. It flows from this reasoning that rules may, in principle, be applicable concurrently if their respective conditions have been established (sections 6.2-6.5). This does not, however, mean that concurrently applicable rules will always coexist peacefully. The chapter discusses two exceptions, namely the existence of alternative rules (section 6.6) and the existence of exclusive rules (section 6.7). In conclusion, the chapter recapitulates the themes running through the various solutions to individual issues of concurrence (section 6.8).

6.2 When the Union legislature explicitly leaves room for other Union rules

The Union legislature often explicitly asserts that the adoption of a directive or regulation does not affect the scope of application of other Union rules. A first example can be found in the area of transport. The Union legislature has emphasised that the rights of travellers under the Package Travel Directive are not affected by the introduction of several regulations in the area of passenger rights.[8] Air passengers are permitted, therefore, to claim compensation from their contracting party for losses resulting from a failure

8 Art. 3 (6), Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; Art. 1 (4), Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air; Art. 7, Regulation (EC) No 392/2009 on the liability of carriers of passengers by sea in the event of accidents; Art. 21, Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway; Art. 2 (8), Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport. These provisions refer to Council Directive 90/314/EEC on package travel, package holidays and package tours. This directive has been replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements, which states, in Art. 29, that references to the former directive must be construed as references to the latter directive.

to perform the services included in the package travel contract, even if the necessary conditions for awarding compensation because of a cancellation of the flight are not met.[9] For its part, the revised Package Travel Directive confirms that any claim for compensation and any power to reduce the price granted under this directive does not affect the rights which may be derived from the regulations in the area of passenger rights. Passengers are entitled to the consequences flowing from each applicable rule, subject only to the requirement that the quantum of damages be adjusted in order to prevent a double recovery of the losses:

> 'Any right to compensation or price reduction under this Directive shall not affect the rights of travellers under Regulation (EC) No 261/2004, Regulation (EC) No 1371/2007, Regulation (EC) No 392/2009 (…), Regulation (EU) No 1177/2010 and Regulation (EU) No 181/2011, and under international conventions. Travellers shall be entitled to present claims under this Directive and under those Regulations and international conventions. Compensation or price reduction granted under this Directive and the compensation or price reduction granted under those Regulations and international conventions shall be deducted from each other in order to avoid overcompensation.'[10]

A second, distinctive example concerns the Union rules on data protection. There is one remark which appears in a great number of the legislative instruments under consideration here. The Union legislature has emphasised that the rules on the protection of personal data should also be complied with when promoting, selling and supplying goods and services to consumers,[11] when performing transport and travel services,[12] when

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9 As the Court noted in Case C-292/18, *Petra Breyer and Heiko Breyer v. Sundair*, ECLI:EU:C:2018:997, at 26. It is not inconceivable that an air carrier offers different types of travel services for the purpose of the same trip or holiday, so that the facts fall within the scope of both the Package Travel Directive and Regulation (EC) No 261/2004.

10 Art. 14 (5), Directive (EU) 2015/2302 on package travel and linked travel arrangements. Art. 12 (1), Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights provides a similar rule: 'This Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.'

11 Recital 26, Directive 2002/65/EC concerning the distance marketing of consumer financial services; Recital 14, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market; Art. 9 (4), Directive 2008/48/EC on credit agreements for consumers; Art. 18, 20, and 21, Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property; Art. 3 (8) and 16 (2), Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

12 Recital 12, Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air; Recital 21 and Art. 10 (5), Regulation (EC) No 1371/2007 on rail passengers' rights and obligations; Recital 29, Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway; Recital 26, Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport; Recital 49, Directive (EU) 2015/2302 on package travel and linked travel arrangements.

providing online content to travellers,[13] when using electronic identification and trust services in the context of electronic transactions,[14] when recovering debts through the new European procedure for the preservation of bank accounts,[15] and when providing online intermediation services and online search engines to business users and corporate website users.[16] The mere fact that these activities are governed by these directives and regulations does not mean that they are excluded from the scope of the Union rules on data protection.[17]

The e-Commerce Directive can be mentioned as a third example. The Union legislature has made clear that this directive does not affect the level of consumer protection as established by other Union rules.[18] What is more, the eleventh recital of the preamble mentions several directives by name, including the directives on unfair terms in consumer contracts,[19] on the protection of consumers in respect of distance contracts,[20] on misleading and comparative advertising,[21] on consumer credit,[22] on package travel, package holidays and package tours,[23] on the protection of the users of

13 Recitals 28 and 30, and Art. 8 (1), Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market.

14 Recital 11 and Art. 5 (1), Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation).

15 Recital 45 and Art. 48 (d), Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

16 Recital 35 and Art. 1 (5), Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

17 Most regulations and directives mentioned above refer to Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. This directive has been repealed by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which states, in Art. 94, that references to the original directive must be construed as references to the regulation.

18 Art. 1 (3), Directive 2000/31/EC on electronic commerce.

19 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

20 Directive 97/7/EC on the protection of consumers in respect of distance contracts. This directive has been repealed by Directive 2011/83/EU of 25 October 2011 on consumer rights, which states, in Art. 31, that references to the former directive must be construed as references to the latter directive.

21 Council Directive 84/450/EEC concerning misleading and comparative advertising. This directive has been repealed by Directive 2006/114/EC concerning misleading and comparative advertising, which states, in Art. 10, that references to the former directive must be construed as references to the latter directive.

22 Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit. This directive has been repealed by Directive 2008/48/EC on credit agreements for consumers.

23 Council Directive 90/314/EEC on package travel, package holidays and package tours. This directive has been repealed by Directive (EU) 2015/2302 on package travel and linked travel arrangements, which states, in Art. 29, that references to the former directive must be construed as references to the latter directive.

immovable property on a time-share basis,[24] on the liability for defective products,[25] on the sale of consumer goods and associated guarantees,[26] and on distance marketing of consumer financial services.[27] The Union legislature stresses that the e-Commerce Directive 'complements' the information requirements introduced by these directives.[28]

Such explicit statements, expressed by the Union legislature, play an important role once a legal dispute must be resolved. Consider the approach followed by the Court of Justice in a case between two competitors in the laser technology industry. The first company – Visys – used the corporate name of the second company – BEST – as part of the domain name 'www.bestlasersorter.com'. The content of this website was identical to the content of the websites of BEST. BEST alleged that the use of its corporate name qualified as 'misleading advertising'.[29] Visys replied that the use of a domain name does not fall within the scope of the Directive on misleading and comparative advertising, because it does not qualify as a 'form of representation' which is made 'in order to promote the supply of goods or services'.[30] To support this proposition, the company referred to the e-Commerce Directive. Under this directive, the use of a domain name does not qualify as 'commercial communication', that is a form of communication 'designed to promote, directly or indirectly, the goods, services or image of a company (…)'.[31] In the view of Visys, the same approach should be taken in the context of misleading and comparative advertising.

Does the scope of application of the e-Commerce Directive affect the scope of application of the Directive on misleading and comparative advertising? Contrary to the Commission, but in line with the advice of its Advocate General,[32] the Court answered this question in the negative.

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24 Directive 94/47/EC on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis. This directive has been repealed by Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, which states, in Art. 18, that references to the former directive must be construed as references to the latter directive.

25 Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions concerning liability for defective products.

26 Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. This directive will be repealed and replaced by Directive 2019/771 on certain aspects concerning contracts for the sale of goods, which determines, in Art. 23, that references to the repealed directive must be construed as reference to the new directive.

27 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services.

28 Art. 1 (3) and Recital 11, Directive 2000/31/EC on electronic commerce.

29 The company also relied upon trade mark law, but we will not consider that issue here.

30 Art. 2 (1) of Directive 84/450/EEC concerning misleading advertising; and Article 2 (a) of Directive 2006/114/EC concerning misleading and comparative advertising.

31 Art. 2 (f) of Directive 2000/31/EC on certain legal aspects of information society services.

32 Opinion A-G Mengozzi, Case C-657/11, *Belgian Electronic Sorting Technology v. Bert Peelaers and Visys*, ECLI:EU:C:2013:195, at 36-45.

In its reasoning, the Court first explained that the use of a domain name 'is clearly intended to promote the supply of the goods or services of the domain name holder'.[33] The Court then explained that the fact that the e-Commerce Directive excludes this activity from its scope of application does not necessarily mean that the same activity is also excluded from the scope of application of the Directive on misleading and comparative advertising.[34] In the view of the Court, the two directives 'pursue different objectives'. The Court also noted that the e-Commerce Directive itself indicates that it is 'without prejudice to the existing level of protection for consumer interests'.[35] Against this background, the Court confirmed that the use of domain names is governed by the Directive concerning misleading and comparative advertising, in spite of the fact that the same activity does not fall within the scope of application of the e-Commerce Directive.[36]

Instead of mentioning the directives or regulations by name, the Union legislature sometimes determines that an entire area of the law should remain unaffected. Consider the Unfair Commercial Practices (UCP) Directive as an example. This directive prohibits commercial practices which limit the consumer's ability to make an informed decision on whether to go ahead with a transaction proposed by a commercial trader.[37] Meanwhile, the UCP Directive is without prejudice to 'contract law and, in particular, (…) the rules on the validity, formation or effect of a contract'.[38] In accordance with this statement, the Court has confirmed that the UCP Directive does not affect the scope of application of the Unfair Terms Directive, which prohibits unfair terms in contracts concluded between a seller or supplier and a consumer, and prescribes that such terms 'shall (…) not be binding on the consumer'.[39] In the view of the Court, the existence of an unfair commercial practice may be taken into account when assessing the unfairness of contractual terms,[40] but does not have a 'direct effect' on whether the contract is valid from the point of view of the Unfair Terms Directive.[41]

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33 Case C-657/11, *Belgian Electronic Sorting Technology v. Bert Peelaers and Visys*, ECLI:EU:C:2013:516, at 46.

34 Case C-657/11, *Belgian Electronic Sorting Technology v. Bert Peelaers and Visys*, ECLI:EU:C:2013:516, at 50.

35 Case C-657/11, *Belgian Electronic Sorting Technology v. Bert Peelaers and Visys*, ECLI:EU:C:2013:516, at 51.

36 Case C-657/11, *Belgian Electronic Sorting Technology v. Bert Peelaers and Visys*, ECLI:EU:C:2013:516, at 60.

37 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

38 Art. 3 (2), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

39 Art. 6 (1), Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

40 Case C-453/10, *Jana Pereničová and Vladislav Perenič v. SOS*, ECLI:EU:C:2012:144, at 43; Case C-109/17, *Bankia v. Juan Carlos Marí Merino and Others*, ECLI:EU:C:2018:735, at 49.

41 Case C-453/10, *Jana Pereničová and Vladislav Perenič v. SOS*, ECLI:EU:C:2012:144, at 46; Case C-109/17, *Bankia v. Juan Carlos Marí Merino and Others*, ECLI:EU:C:2018:735, at 50.

These are not the only examples. In many cases, the Union legislature indicates that the adoption of a directive or regulation does not affect the scope of application of other Union rules.[42] We have seen that the Court of Justice attaches decisive importance to such statements. They form a reason for the Court to start from the premise that each rule must be assessed independently and that no rule should be excluded in advance. In principle, then, each directive or regulation ought to have its intended effect if the necessary elements have been established.

6.3 When the Union legislature remains silent about the relationship between Union rules

Does the same principle apply when the Union legislature remains silent about the relationship between secondary Union laws? Indeed, it appears that the scope of application of one rule is only affected by another rule if the Union legislature explicitly asserts that this shall be the case. Case law shows that, in the absence of contraindications, the Court of Justice assumes that each Union rule must be considered on its own merits.

The case *Travel Vac v. Sanchís* can be mentioned as a first example. Travel Vac concluded a so-called 'timeshare' contract with Manuel José Antelm Sanchís. Under the contract, Sanchís was entitled to use a furnished apartment located in Valencia for one week per year. Three days after the parties had signed the document, Sanchís indicated that he wished to cancel the contract. Eventually, Travel Vac decided to claim specific performance before a court of law. Sanchís defended himself by arguing that he had legitimately cancelled the contract. He could not, however, rely upon the Timeshare Directive in support of this argument,[43] because this directive had not yet been transposed into Spanish law.[44] For this reason, Sanchís relied upon the provisions implementing the Doorstep-Selling Directive, which also provides the consumer with the right to withdraw from a

42 Another important example, albeit outside the scope of the present book, is the Services Directive, which explicitly states that it does not affect the Union laws and national laws governing certain topics, such as criminal law and social security. See Art. 1 (3)-(7), Directive 2006/123/EC on services in the internal market.

43 Art. 5 (1), Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. This directive has been repealed by Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

44 Opinion A-G Alber, Case C-423/97, *Travel Vac v. Manuel José Antelm Sanchís*, ECLI:EU:C:1998:576, at 18, who notes that the deadline for the transposition of the directive had not yet been expired at the time of conclusion of the contract.

contract.[45] In his view, a timeshare contract must be qualified as a contract for the supply of services within the meaning of this directive.[46]

Does the Timeshare Directive affect the scope of application of the Doorstep-Selling Directive? The position of the Union legislature was not quite clear. The Timeshare Directive contained no clues at all, and the Doorstep-Selling Directive only mentioned that it shall not apply to 'contracts for the construction, sale and rental of immoveable property or contracts concerning other rights relating to immoveable property'.[47] Yet the Court was not prepared to conclude that a timeshare contract is covered by this exception, because a timeshare contract also concerns the provision of 'separate services'.[48] Neither did the Court concur with the argument, put forward by Travel Vac,[49] that the Union legislature intended to exclude timeshare contracts from the scope of the 'general' Doorstep-Selling Directive, pending the adoption of the 'specific' Timeshare Directive. In the absence of express statements to that effect, the Doorstep-Selling Directive remains applicable, so the Court argued:

> 'Neither directive contains provisions ruling out the application of the other. Moreover, it would defeat the object of Directive 85/577 to interpret it as meaning that the protection it provides is excluded solely because a contract generally falls under Directive 94/47. Such an interpretation would deprive consumers of the protection of Directive 85/577 even when the contract was concluded away from business premises.'[50]

The second example which must be mentioned is the case *Heininger v. Bayerische Hypo- und Vereinsbank*, which concerned the conclusion by a consumer of a credit agreement with the aim of financing the purchase of immovable property. Having concluded that the former Consumer Credit Directive and the former Doorstep-Selling Directive may, on the face of it, both be applicable to such contracts,[51] the Court examined whether the first directive takes precedence over the second directive.[52] The German govern-

45 Art. 5, Council Directive 85/577/EEC on the protection of consumers in respect of contracts negotiated away from business premises.

46 Art. 1 (1), Council Directive 85/577/EEC on the protection of consumers in respect of contracts negotiated away from business premises. This directive has been repealed by Directive 2011/83/EU on consumer rights.

47 Art. 3 (2) (a), Council Directive 85/577/EEC on the protection of consumers in respect of contracts negotiated away from business premises.

48 Case C-423/97, *Travel Vac v. Manuel José Antelm Sanchís*, ECLI:EU:C:1999:197, at 25.

49 Opinion A-G Alber, Case C-423/97, *Travel Vac v. Manuel José Antelm Sanchís*, ECLI:EU:C:1998:576, at 13.

50 Case C-423/97, *Travel Vac v. Manuel José Antelm Sanchís*, ECLI:EU:C:1999:197, at 23.

51 Case C-481/99, *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank*, ECLI:EU:C:2001:684, at 25-35.

52 The case concerned the relationship between Council Directive 85/577/EEC concerning consumer contracts negotiated away from business premises and Council Directive 87/102/EEC concerning consumer credit. The first directive has been repealed and replaced by Directive 2011/83/EU on consumer rights, the second by Directive 2008/48/EC on credit agreements for consumers.

ment had taken this position, arguing that, in accordance with the principle *lex specialis derogat legi generali*, a consumer should not be granted a right of cancellation under the 'general' Doorstep-Selling Directive if no such right would be available under the 'specific' Consumer Credit Directive.[53] The Court reached a different conclusion:

> 'It is sufficient to observe, as regards those submissions, that the doorstep-selling directive is (…) designed to protect consumers against the risks arising from the conclusion of contracts away from the trader's premises and, second, that that protection is assured by the introduction of a right of cancellation. (…) Neither the preamble to nor the provisions of the consumer credit directive contain anything to show that the Community legislature intended, in adopting it, to limit the scope of the doorstep-selling directive in order to exclude secured-credit agreements from the specific protection provided by that directive.'[54]

A third example concerns the relationship between Regulation (EC) No 1008/2008, which lays down common rules for the operation of air services, and the Unfair Terms Directive. The Court had to determine whether the terms contained in a contract of carriage by air may be qualified as 'unfair', given the fact that Article 22 (1) of Regulation (EC) No 1008/2008 provides that air carriers may 'freely set air fares and air rates'.[55] Is it possible for such air fares and air rates to be qualified as 'unfair' at all? The Court held that, in the absence of contraindications on the part of the Union legislature, the scope of application of the Unfair Terms Directive is not affected by Regulation (EC) No 1008/2008:

> '[I]t would be possible to find that that directive does not apply in the field of air services governed by Regulation No 1008/2008 only if it is clearly provided for by the provisions of that regulation. However, neither the wording of Article 22 of Regulation No 1008/2008 relating to pricing freedom nor that of the other provisions of that regulation permits such a view, even though Directive 93/13 was already in force on the date of adoption of that regulation. (…) Nor can it be inferred from the objective pursued by Article 22(1) of Regulation No 1008/2008 that contracts of carriage by air are not subject to compliance with the general rules protecting consumers against unfair terms.'[56]

The Court adopts the same approach when it assesses the relationship between multiple rules contained in the same directive or regulation. This may be demonstrated by discussing a fourth example, which concerns the

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53 Case C-481/99, *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank*, ECLI:EU:C:2001:684, at 37.

54 Case C-481/99, *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank*, ECLI:EU:C:2001:684, at 38-39.

55 Art. 22 (1), Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community.

56 Case C-290/16, *Air Berlin & Co. v. Bundesverband der Verbraucherzentralen*, ECLI:EU:C:2017:523, at 45-46.

relationship between two provisions contained in the Copyright Directive. This directive provides for certain exceptions to the exclusive right of authors, performers and producers to authorise or prohibit the reproduction of their works. Under the so-called 'reprography exception', no authorisation is required for reproductions 'on paper or any similar medium', provided that they are 'effected by the use of any kind of photographic technique or by some other process having similar effects'.[57] Under the so-called 'private copying exception', no authorisation is required for reproductions 'on any medium', provided that they are 'made by a natural person for private use and for ends that are neither directly nor indirectly commercial'.[58] Although no prior authorisation is necessary, both provisions do require that the rightholders receive 'fair compensation' for the reproduction of their protected works.

The relationship between these exceptions played a central role in legal proceedings between Reprobel, the organisation responsible for the collection and distribution of the compensation payments in Belgium, and Hewlett-Packard Belgium, an importer of multifunctional printers. Reprobel and Hewlett-Packard Belgium disagreed over the amount of 'fair compensation' which must be paid to Reprobel on the basis of the Belgian laws implementing the Copyright Directive. The Brussels Court of Appeal wondered whether the amount of compensation must be different depending on whether the reproduction is made for commercial or for non-commercial purposes. After all, the 'private copying exception' applies only to reproductions made by natural persons for private use, whereas the 'reprography exception' applies to all users. Does this mean that the commercial or non-commercial use of a multifunctional printer is a relevant factor that should be taken into account when determining the level of 'fair compensation'?

In its reply to this question, the Court of Justice first explained the substantive scope of both exceptions. The Court observed that the 'reprography exception' applies to all users, regardless of whether the reproduction is made for commercial or for non-commercial purposes.[59] The fact that the 'private copying exception' applies only to natural persons does not mean that these users are excluded from the scope of the 'reprography exception'.[60] For its part, the 'private copying exception' applies to 'any medium', regardless of the technique used.[61] The fact that the 'reprography exception' applies only to reproductions made by using photographic techniques does not mean that these reproductions are excluded from the scope

57 Art. 5 (2) (a), Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

58 Art. 5 (2) (b), Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

59 Art. 5 (2) (a), Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

60 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 30.

61 Art. 5 (2) (b), Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

of the 'private copying exception'.[62] Essentially, what the Court does here is explaining that it is impossible to generally qualify one of the rules as the *lex specialis* and the other as the *lex generalis*, because the differences between them cut both ways.

Having explained the substantive scope of both provisions, the Court concluded that they may be applicable concurrently to photographic reproductions printed on paper and made by natural persons for private use.[63] But instead of giving one of the provisions precedence over the other, the Court took a step back and explained that the amount of 'fair compensation' must always be linked to the actual losses sustained by authors of protected works, whatever the legal basis of the claim.[64] It is appropriate, therefore, to make a distinction between commercial and non-commercial reproductions when determining the amount of compensation under the 'reprography exception', so that the actual losses of the rightholders are compensated.[65] This shows, once again, that the Court is careful not to exclude one of the applicable rules and tries to realise the objectives underlying both rules to the greatest possible extent.

We can see the same principle at work in a judgment concerning the extent of the losses which must be compensated for under the so-called Enforcement Directive.[66] Article 13 (1) determines that the infringer of an intellectual property right must pay the rightholder 'damages appropriate to the actual prejudice suffered by him/her as a result of the infringement'. The provision goes on to determine how judicial authorities should calculate the damages, offering them two different options. If they choose to calculate the damages in accordance with option (a), they must take into account 'all appropriate aspects', including 'lost profits', 'unfair profits made by the infringer', and 'elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement'. If they choose option (b), they must calculate the damages 'as a lump sum', on the basis of elements 'such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question'. Contrary to option (a), option (b) does not mention non-economic elements. What is more, the Union legislature has qualified option (b) as the 'alternative' option. Does this mean that a rightholder who claims compensation in accordance with option (b) cannot claim compensation for non-pecuniary losses under option (a)?

In its reply to this question, referred by the Supreme Court of Spain, the Court of Justice observed that option (b) does not mention 'moral prejudice', but does not exclude this type of harm either. In fact, the Union

62 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 32.
63 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 33-34.
64 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 35-39, referring to Case C-467/08, *Padawan v. SGAE*, ECLI:EU:C:2010:620, at 37, 40 and 42.
65 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 40-43.
66 Directive 2004/48/EC on the enforcement of intellectual property rights.

legislature states that the lump sum must be calculated on the basis of 'at least' the amount of royalties or fees, leaving room for other elements to be taken into account.[67] Moreover, option (b) should be read in conjunction with the opening sentence of Article 13 (1), which determines that the rightholder must be compensated for the 'actual prejudice' suffered. In the view of the Court, an exclusion of the possibility to claim compensation for non-pecuniary losses would go against the purpose of this provision[68] and against the objectives of the Enforcement Directive, which aims at achieving a high level of protection of holders of intellectual property rights.[69]

It is against this backdrop that the Court concluded that the holder of an intellectual property right should always be 'compensated in full' for the 'actual prejudice suffered', including 'any moral prejudice'.[70] Because a lump sum calculated on the basis of hypothetical royalties merely compensates for pecuniary losses,[71] the rightholder who claims such compensation in accordance with option (b) may also, 'in addition to the damages thus calculated',[72] claim compensation for any 'moral prejudice' in accordance with option (a).[73] In other words: the Court determined that the claims are not mutually exclusive – as might be suggested by the qualification of option (b) as the 'alternative' option – but may be combined, provided that the conditions of each claim are fulfilled.

The foregoing demonstrates that the Court of Justice strives to realise the objectives of each Union rule to the greatest possible extent. The scope of application of one rule is only affected by the scope of application of another rule if this is clearly provided by the Union legislature. In the absence of express indications, the Court assumes that the rules may be applicable concurrently. The question may be raised whether the same principle applies when it comes to the relationship between harmonising measures and national laws. To what extent, if at all, should the latter be excluded in favour of the former?

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67 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 15.

68 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 17-18.

69 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 20-24, referring to Recitals 10, 17 and 26 of Directive 2004/48/EC on the enforcement of intellectual property rights.

70 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 25.

71 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 20.

72 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 26.

73 Case C-99/15, *Christian Liffers v. Producciones Mandarina and Mediaset España Comunicación*, ECLI:EU:C:2016:173, at 26-27.

6.4 How to determine whether national laws are affected by secondary Union rules?

Does the same principle apply when the relationship between harmonising measures and national laws must be determined? After all, the very purpose of harmonisation is to establish common rules for the whole of the European market. Should we not assume, then, that harmonising measures necessarily exclude or replace otherwise applicable national laws? The reality is more complicated, however. The scope of application of directives and regulations is limited, because the competence of the Union is restricted and because the Union legislature does not regulate all issues exhaustively.

Indeed, the competence of the Union to approximate national laws may be restricted by the very treaty provision upon which it rests. Take social policy as an example. This is an area in which the Union shares competence with the Member States.[74] Importantly, Article 153 TFEU prescribes that any harmonising measure which aims at protecting workers must be cast in the form of a directive, can only be used to introduce 'minimum requirements for gradual implementation',[75] and 'shall not prevent any Member State from maintaining or introducing more stringent protective measures'.[76] It does not come as a surprise, therefore, that the Working Time Directive merely lays down 'minimum safety and health requirements for the organisation of working time',[77] and that the Court of Justice has confirmed that this directive does not affect national laws more favourable to the protection of workers.[78]

Most treaty provisions do not, however, state explicitly that the Union legislature may only introduce 'minimum requirements'.[79] In fact, the provision which forms the basis of most directives and regulations in the area of the internal market – the current Article 114 TFEU – only permits Member States to maintain or introduce national laws 'on grounds of major needs',[80] or in the interest of the protection of the environment or the working environment.[81] What is more, the provision which has been used to introduce common rules concerning the liability for defective products

74 Art. 4 (2) (b) TFEU.

75 Art. 153 (2) (b) TFEU, which refers back the fields listed in Art. 153 (1) (a) to (i), which mentions the working environment, working conditions and social security.

76 Art. 153 (4) TFEU.

77 Art. 1 (1), Directive 2003/88/EC concerning certain aspects of the organisation of working time.

78 Case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, ECLI:EU:C:2012:33, at 48-49; Case C-385/17, *Torsten Hein v. Albert Holzkamm & Co.*, ECLI:EU:C:2018:1018, at 30-31.

79 Art. 16, 50, 53, 81, 91, 100 (2), 114, 115, 168 (4) (c), and 352 TFEU do not contain such statements. Nor does Art. 103 (1) TFEU, but this provision must be distinguished because the Union has exclusive competence in the area of competition law on the basis of Art. 3 (1) (b) TFEU.

80 Art. 114 (4) in conjunction with Art. 36 TFEU.

81 Art. 114 (4)-(10) TFEU.

and common rules governing the contractual relationship between self-employed commercial agents and their principals – the current Article 115 TFEU – does not mention any exception at all, but only prescribes that the measure must be passed unanimously by the Council and must be cast in the form of a directive.[82] This suggests that Member States have little room for manoeuvre when regulating the internal market.

Yet it may be recalled that when the Union shares competence with the Member States, as is the case in the context of the internal market,[83] the Member States may legislate to the extent that the Union has not exercised its competence to legislate, or has stopped doing so.[84] The Member States need not be empowered by the Union to legislate, as is the case when the Treaties confer an exclusive competence on the Union.[85] When it comes to the internal market, the question to consider, therefore, is whether, and to what extent, the Union has actually exercised its competence to legislate.[86] In the words of the Protocol on the Exercise of Shared Competence, Union action 'only covers those elements governed by the Union act in question and therefore does not cover the whole area'.[87] As a consequence, the scope of the exercise by the Union of a shared competence can only be determined by considering the wording, meaning and structure of the directive or regulation at issue.[88]

In this regard, it is important to observe that many directives and regulations assert explicitly that they are aimed at so-called 'minimum harmonisation'. The Union legislature has, for instance, made clear that Member States may adopt or retain a higher level of protection for consumers than the Unfair Terms Directive[89] and the current Consumer Sales Directive[90] require, and that they may maintain or bring into force provisions more favourable to the creditor than the Late Payment Directive contains.[91]

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82 Council Directive 85/374/EEC concerning the liability for defective products; Council Directive 86/653/EEC relating to self-employed commercial agents (also based on today's Art. 53 (1) TFEU, which does not mention any exception either).

83 Art. 4 (2) (a) TFEU.

84 Art. 2 (2) TFEU.

85 Art. 2 (1) TFEU.

86 Craig & De Búrca 2015, p. 84-85.

87 Protocol No. 25 on the exercise of shared competence.

88 As the Court indicates in Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 16; Case C-402/03, *Skov v. Bilka*, ECLI:EU:C:2006:6, at 22.

89 Art. 8, Council Directive 93/13/EEC on unfair terms in consumer contracts, as confirmed in Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid v. Ausbanc*, ECLI:EU:C:2010:309, at 29; Case C-453/10, *Jana Pereničová and Vladislav Perenič v. SOS*, ECLI:EU:C:2012:144, at 34.

90 Art. 1 (1), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. The situation is different under the new Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods and under Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, which will be explained in section 6.5.

91 Art. 12 (3), Directive 2011/7/EU on combating late payment in commercial transactions.

Examples can also be found in the area of passenger rights. While it is true that only some regulations explicitly state that they establish 'minimum rights for passengers'[92] or provide for a 'minimum level of protection',[93] all regulations in this field do mention that passengers may be entitled to 'further compensation'.[94] In accordance with these statements, the Court has made clear that air passengers may be entitled to compensation 'on a legal basis other than Regulation No 261/2004',[95] and that rail passengers may be entitled to compensation 'on the basis of the applicable national law', in addition to the right to receive compensation under the regulation governing rail passengers' rights and obligations.[96]

The Enforcement Directive, concerning the enforcement of intellectual property rights, provides yet another example. According to the Union legislature, the aim of this directive 'is not to introduce an obligation to provide for punitive damages'.[97] But the Union legislature has also determined that the directive does not affect national legislation which is 'more favourable for rightholders'.[98] Does this mean that awarding punitive damages on the basis of national laws is permitted? In its reply to this question, asked by the Supreme Court of Poland, the Court of Justice notes that the Enforcement Directive aims at ensuring 'a high, equivalent and homogeneous level of protection in the internal market',[99] but also observes that the directive is without prejudice to national laws more favourable to the protection of rightholders.[100] Against this background, the Court holds that the fact that the Enforcement Directive itself does not introduce an obligation on the part of the Member States to provide for punitive damages

92 Art. 1 (1), Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

93 Recital 2, Regulation (EU) 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway.

94 Art. 12 (1), Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; Art. 11, Regulation (EC) No 1371/2007 on rail passengers' rights and obligations; Art. 21, Regulation (EU) 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway; Art. 22, Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport.

95 Subject to the conditions and limits set out in Art. 29 of the Montreal Convention, see Case C-83/10, *Aurora Sousa Rodríguez and Others v. Air France*, ECLI:EU:C:2011:652, at 38; Joined Cases C-581/10 and C-629/10, *Emeka Nelson and Others v. Deutsche Lufthansa AG* (C-581/10), *and TUI Travel and Others v. Civil Aviation Authority* (C-629/10), ECLI:EU:C:2012:657, at 59.

96 Subject to the conditions and limits set out in Art. 32 of the CIV Uniform Rules, see Case C-509/11, *ÖBB-Personenverkehr*, ECLI:EU:C:2013:613, at 40.

97 Recital 26, Directive 2004/48/EC on the enforcement of intellectual property rights.

98 Art. 2 (1), Directive 2004/48/EC on the enforcement of intellectual property rights.

99 Recital 10, Directive 2004/48/EC on the enforcement of intellectual property rights.

100 Case C-367/15, *Oławska Telewizja Kablowa v. Stowarzyszenie Filmowców Polskich*, ECLI:EU:C:2017:36, at 22.

'cannot be interpreted as a prohibition on introducing such a measure'.[101] The Court concludes that awarding punitive damages in accordance with national laws is permitted, subject only to the requirement that the amount of damages does not exceed the losses suffered 'so clearly and substantially' that it constitutes an abuse of rights under the directive.[102]

If the Union legislature has not asserted explicitly that a directive or regulation is aimed at 'minimum harmonisation', this conclusion may nonetheless be drawn on the basis of an assessment of the wording, meaning and purpose of individual provisions. Take the Directive concerning self-employed commercial agents as an example. This directive requires Member States to introduce a right to compensation for commercial agents, so as to make good the losses suffered after termination of the agency contract. When implementing the directive, Member States must choose one of two available compensation schemes.[103] They must either transpose the rules which entitle the commercial agent to an 'indemnity',[104] or opt for the rules which entitle him to 'compensation for the damage he suffers as a result of the termination'.[105]

If a Member State chooses the first alternative, the directive makes clear that the indemnity must be calculated on the basis of the benefits accruing to the principal as a result of the work of the agent.[106] The directive also prescribes that the amount of the indemnity must be 'equitable' when weighed up against the commission lost by the commercial agent and cannot, in any event, exceed the average annual remuneration.[107] Finally, the directive adds that the award of an indemnity shall not 'prevent the commercial agent from seeking damages'.[108] In the view of the Court, this means that the agent may also claim compensation on the basis of the applicable national law, 'when that provides for the principal's liability in contract or tort'.[109]

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101 Case C-367/15, *Oławska Telewizja Kablowa v. Stowarzyszenie Filmowców Polskich*, ECLI:EU:C:2017:36, at 28.

102 Case C-367/15, *Oławska Telewizja Kablowa v. Stowarzyszenie Filmowców Polskich*, ECLI:EU:C:2017:36, at 31, referring to Art. 3 (2), Directive 2004/48/EC on the enforcement of intellectual property rights.

103 Art. 17 (1), Council Directive 86/653/EEC relating to self-employed commercial agents.

104 Art. 17 (2), Council Directive 86/653/EEC relating to self-employed commercial agents.

105 Art. 17 (3), Council Directive 86/653/EEC relating to self-employed commercial agents.

106 Art. 17 (2) (a), Council Directive 86/653/EEC relating to self-employed commercial agents.

107 Art. 17 (2) (a)-(b), Council Directive 86/653/EEC relating to self-employed commercial agents.

108 Art. 17 (2) (c), Council Directive 86/653/EEC of 18 December 1986 relating to self-employed commercial agents.

109 Case C-338/14, *Quenon v. Citibank and Citilife*, ECLI:EU:C:2015:795, at 31.

If anything, the examples discussed in this section show that directives and regulations do not necessarily affect the scope of application of national laws.[110] Sometimes, the very treaty provision upon which the competence of the Union legislature is based prescribes that any harmonising measure can only ever establish minimum requirements. In many other instances, the wording, meaning and purpose of the directive or regulation itself indicate that the Union legislature has merely aimed at introducing minimum requirements. In both situations, it is clear that the scope of application of directives and regulations is limited and that they do not automatically replace or exclude otherwise applicable national laws.

6.5 The case of 'complete' harmonisation of national laws

Sometimes, however, the Union legislature has not aimed at introducing minimum requirements, but at a 'complete' harmonisation of the laws of the Member States. In fact, 'complete' harmonisation has gradually emerged as the preferred technique in the field of consumer protection.[111] Does this mean that such measures do exclude otherwise applicable national laws? Again, it is appropriate to adopt a cautious approach and to avoid jumping to this conclusion. Although they certainly have the capacity to trump otherwise applicable national laws, as will be shown in section 6.7, even directives and regulations aimed at 'complete' harmonisation often do leave room for the application of such laws. They might exhaustively regulate some issues, but they cannot be wholly autonomous and self-contained.

The Product Liability Directive may serve as an illustrative example. According to the Court, this directive seeks to achieve 'complete harmonisation' with regard to the matters regulated by it.[112] On the other hand, the directive itself indicates that the harmonisation 'cannot be total at the present stage'.[113] Indeed, the directive leaves considerable room for the application of national laws. It introduces a system of strict liability, but it does not preclude the application of 'other systems of contractual or

110 Another important example, albeit outside the scope of the present book, is the Services Directive, which explicitly states that it does not affect the Union laws and national laws governing certain topics, such as criminal law and social security. See Art. 1 (3)-(7), Directive 2006/123/EC on services in the internal market.

111 As observed by e.g. Faure 2008, p. 434-435; Mak 2009, p. 55-58; Whittaker 2009, p. 224-226; Smits 2010, p. 5-7; Weatherill 2012, p. 183-185; Giliker 2015, p. 6-7.

112 Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 24; Case C-154/00, *Commission v. Greece*, ECLI:EU:C:2002:254, at 20; Case C-402/03, *Skov v. Bilka*, ECLI:EU:C:2006:6, at 23; Case C-127/04, *Declan O'Byrne v. Sanofi Pasteur*, ECLI:EU:C:2006:93, at 35; Case C-285/08, *Leroy Somer v. Dalkia France and Ace Europe*, ECLI:EU:C:2009:351, at 21; Case C-495/10, *Centre hospitalier universitaire de Besançon v. Thomas Dutrueux and Caisse primaire d'assurance maladie du Jura*, ECLI:EU:C:2011:869, at 20; Case C-310/13, *Novo Nordisk Pharma*, ECLI:EU:C:2014:2385, at 23; Case C-621/15, *Sanofi Pasteur and Others*, ECLI:EU:C:2017:484, at 20.

113 Recital 18, Council Directive 85/374/EEC concerning the liability for defective products.

non-contractual liability based on other grounds'.[114] Moreover, Article 9 of the directive determines that the producer must compensate for damage resulting from death or from personal injuries and for damage to, or destruction of, an item of property intended and used for private use or consumption. This means that the compensation for non-material damage[115] and for damage to an item of property intended and used for professional purposes is not governed by the directive, but by the applicable national law.[116]

Consider also the UCP Directive, which determines that Member States cannot restrict the freedom to provide services or the free movement of goods for reasons falling within its scope.[117] In the view of the Court, this means that the directive 'fully harmonises' the rules on unfair business-to-consumer commercial practices.[118] Meanwhile, Article 5 makes significant inroads into the directive's own scope of application. To begin with, its rules are 'without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'.[119] As we have seen, the Court has interpreted this provision as meaning that the UCP Directive, which is aimed at 'maximum' harmonisation, does not affect the scope of application of the Unfair Terms Directive, which is aimed at 'minimum' harmonisation.[120] It is fair to assume, then, that the UCP Directive has no direct effect on whether a contract is valid from the point of view of national

114 Art. 13, Council Directive 85/374/EEC concerning the liability for defective products, as interpreted in Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 22; Case C-154/00, *Commission v. Greece*, ECLI:EU:C:2002:254, at 18; Case C-402/03, *Skov v. Bilka*, ECLI:EU:C:2006:6, at 47; Case C-285/08, *Leroy Somer v. Dalkia France and Ace Europe*, ECLI:EU:C:2009:351, at 23.

115 Art. 9 expressly provides that it 'shall be without prejudice to national provisions relating to non-material damage'. According to the Court, this issue 'is governed solely by national law', see Case C-203/99, *Henning Veedfald v. Århus Amtskommune*, ECLI:EU:C:2001:258, at 27.

116 As the Court confirmed in Case C-285/08, *Leroy Somer v. Dalkia France and Ace Europe*, ECLI:EU:C:2009:351, at 24-32.

117 Art. 4, Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

118 Joined Cases C-261/07 and C-299/07, *VTB-VAB v. Total Belgium* (C-261/07) *and Galatea v. Sanoma Magazines Belgium* (C-299/07), ECLI:EU:C:2009:244, at 52; Case C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs v. Plus Warenhandelsgesellschaft*, ECLI:EU:C:2010:12, at 41; Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag & Co. v. 'Österreich'-Zeitungsverlag*, ECLI:EU:C:2010:660, at 30; Case C-288/10, *Wamo v. JBC and Modemakers Fashion*, ECLI:EU:C:2011:443, at 33; Case C-265/12, *Citroën Belux v. FvF*, ECLI:EU:C:2013:498, at 20; Case C-343/12, *Euronics Belgium v. Kamera Express*, ECLI:EU:C:2013:154, at 24; Case C-421/12, *Commission v. Belgium*, ECLI:EU:C:2014:2064, at 55 ('complete harmonisation'); Case C-295/16, *Europamur Alimentación*, ECLI:EU:C:2017:782, at 39.

119 Art. 3 (2), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

120 Case C-453/10, *Jana Pereničová and Vladislav Perenič v. SOS*, ECLI:EU:C:2012:144, at 45-46; Case C-109/17, *Bankia v. Juan Carlos Marí Merino and Others*, ECLI:EU:C:2018:735, at 50.

contract law either.[121] What is more, the UCP Directive also determines that Member States may impose stricter requirements in relation to financial services and immovable property.[122] This has been a reason for the Court to permit Member States to generally prohibit so-called 'combined offers', which include financial services, to consumers.[123]

The same approach has been chosen in the context of the Consumer Credit Directive, the Consumer Rights Directive, the revised Consumer Sales Directive and the newly introduced Directive concerning contracts for the supply of digital content and digital services. These directives generally prohibit Member States to depart from their respective provisions.[124] But they also leave important issues to the applicable national law. The Consumer Credit Directive does not, for instance, affect the power to terminate the credit agreement for breach.[125] Nor does the Consumer Rights Directive preclude the consumer to 'have recourse to other remedies provided for by national law',[126] such as claiming performance and compensation,[127] in addition to the power of the consumer to terminate the contract if the trader has failed to deliver the goods in time.[128] Finally, all these directives are without prejudice to 'general contract law', such as 'the rules on the validity, formation or effect of a contract'.[129] Member States are permitted, for instance, to prescribe that a consumer contract is invalid – and may, for that reason, be declared null and void – if it has not been put down in writing or has not been signed by the contracting parties.[130]

The foregoing demonstrates that we may only reach the conclusion that a directive or regulation excludes otherwise applicable national laws after a careful assessment of the wording, meaning and purpose of the harmonising measure at issue. Even if the aim of the Union legislature has been to exhaustively regulate some issues, the resulting harmonisation will always

121 See e.g. Stuyck 2015, p. 743-744.

122 Art. 3 (9), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

123 Case C-265/12, *Citroën Belux v. FvF*, ECLI:EU:C:2013:498, at 22.

124 Art. 22 (1), Directive 2008/48/EC on credit agreements for consumers; Art. 4, Directive 2011/83/EU on consumer rights; Art. 4, Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods; Art. 4, Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

125 Recital 33, Directive 2008/48/EC on credit agreements for consumers.

126 Art. 18 (4), Directive 2011/83/EU on consumer rights.

127 As explained in Recital 53, Directive 2011/83/EU on consumer rights.

128 Art. 18 (2), Directive 2011/83/EU on consumer rights.

129 Recital 30 ('contract law issues') and Art. 10 (1) ('the validity of the conclusion of credit agreements'), Directive 2008/48/EC on credit agreements for consumers; Art. 3 (5), Directive 2011/83/EU on consumer rights; Art. 3 (6), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods; Art. 3 (10), Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

130 As the Court determined in Case C-42/15, *Home Credit Slovakia v. Klára Bíróová*, ECLI:EU:C:2016:842, at 39-45, concerning the interpretation of Art. 10 (1), Directive 2008/48/EC on credit agreements for consumers.

limited in scope and is almost never really complete. Rather than assuming that a harmonising measure excludes otherwise applicable national laws we should, therefore, start from the premise that each applicable rule, however founded, must be considered on its own merits.

6.6 The first exception: alternative rules

The previous sections have shown that directives and regulations are, by their very nature, limited in scope. They will overlap with other directives and regulations, and they will be complemented by national laws. As a result, a single set of facts may fall within the scope of multiple rules, belonging to the body of secondary Union law and to the applicable national law. In principle, then, the objectives underlying each rule must be realised to the greatest possible extent. This does not, however, mean that concurrently applicable rules will always coexist peacefully. An exception must be made when cumulative application would lead to inconsistent outcomes which cannot exist concurrently. In such situations, an election between the available alternatives is required.

It may be recalled, for instance, that it is impossible to combine termination for breach and specific performance of the same contract. After all, termination means that the duty to perform the obligations under the contract ceases to exist.[131] Likewise, passengers who are confronted with a failure in the performance of the contract of carriage are entitled to elect between several alternatives. They may demand performance – often called 're-routing' – or they may, alternatively, terminate the contract, demand transport to their point of departure and claim 'reimbursement' of the ticket price. Article 18 (1) of Regulation (EU) 1177/2010 determines, for example, that if a carrier reasonably expects a cancellation or a delay in departure from a port terminal for more than 90 minutes, the carrier must offer the passenger a choice between:

> '(a) re-routing to the final destination, under comparable conditions, as set out in the transport contract, at the earliest opportunity and at no additional cost;
> (b) reimbursement of the ticket price and, where relevant, a return service free of charge to the first point of departure, as set out in the transport contract, at the earliest opportunity.'[132]

131 See *supra* section 2.5.

132 Art. 18 (1), Regulation (EU) 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway. Similar rules can be found in Art. 8, Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; Art. 16, Regulation (EC) No 1371/2007 on rail passengers' rights and obligations; Art. 10 (3) and 19, Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport.

The current and future versions of the Consumer Sales Directive may also serve as examples.[133] If the goods delivered by the seller do not meet the requirements for conformity, these directives entitle the consumer to elect between several types of specific performance and termination. In the first instance, the consumer may require the seller to repair the goods or to replace them.[134] The Union legislature considers repair and replacement to be 'alternative remedies'.[135] In the second instance, the consumer may elect between two types of termination. He may require 'an appropriate reduction' of the price or terminate the entire contract.[136] According to the Court, price reduction and termination are 'alternative remedies'.[137] If the necessary conditions are fulfilled, it is up to the consumer to opt for the rule which appears to him to be the most advantageous, both in the first instance (repair or replacement of the goods) and in the second instance (price reduction or termination of the contract).[138]

These are not the only options available to the consumer. It may be recalled that the current Consumer Sales Directive permits Member States to adopt or retain a higher level of protection for consumers than the directive prescribes.[139] In fact, the Union legislature has determined that the rights flowing from the Consumer Sales Directive 'shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability'.[140]

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133 Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, which will be repealed by Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.

134 Art. 3 (3), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Art. 13 (2)-(3), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods. It must be noted that the consumer cannot opt for either repair or replacement if this is 'impossible or disproportionate'.

135 Art. 3 (3), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Art. 13 (2), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.

136 Art. 3 (5), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Art. 13 (4), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods. Note that the latter directive mentions several circumstances which are not mentioned in the former directive.

137 Joined Cases C-65/09 and C-87/09, *Gebr. Weber* (C-65/09) *v. Jürgen Wittmer, and Ingrid Putz* (C-87/09) *v. Medianess Electronics*, ECLI:EU:C:2011:396, at 72.

138 It must be noted that the rules are not entirely similar, for termination of the contract cannot be obtained when the lack of conformity is minor, according to Art. 3 (6), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, and Art. 13 (5), Directive 2019/771 on certain aspects concerning contracts for the sale of goods. See also Case C-32/12, *Soledad Duarte Hueros v. Autociba and Automóviles Citroën España*, ECLI:EU:C:2013:637, at 28.

139 Art. 8 (2), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

140 Art. 8 (1), Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

By contrast, the future Consumer Sales Directive explicitly prohibits Member States to maintain or introduce provisions diverging from the provisions laid down by the directive.[141] Still, the directive only 'fully' harmonises the rules governing the conformity of the goods.[142] It does not deal with 'aspects of general contract law', such as 'the rules on the validity, formation or effect of a contract'.[143]

This means that there may be other alternatives available to the consumer, in addition to the possibilities to demand repair or replacement and to reduce the price or terminate the contract for breach. Under the Dutch law of obligations, for instance, the consumer may be entitled to rescind the sales contract for pre-contractual misrepresentation,[144] or to claim compensation for losses resulting from the misrepresentation.[145] The consumer may also be able to rescind the contract if the seller has committed an unfair commercial practice.[146] Moreover, it might be possible for the consumer to request a court to modify or terminate the contract because of unforeseen circumstances.[147] Even though the necessary conditions of all these rules can be satisfied concurrently on a single set of facts, the legal consequences differ and cannot be awarded cumulatively. It is fair to assume, then, that the consumer must choose which avenue appears to him to be the most advantageous.

Can two liability rules ever lead to inconsistent outcomes, so that an election between them is required? It may be remembered that most differences can be bridged at the stage of assessing the quantum of damages. After all, awarding compensation on the basis of one rule may reduce or even completely remove the damage which is relevant in the context of another applicable rule.[148] It is fair to assume that the same solution can and should be adopted in the context of secondary Union law. Consider, for instance, the relationship between the rights of passengers and travelers.

141 Art. 4, Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.

142 As the Union legislature emphasises in Recitals 10, 11 and 47, and in Art. 1, Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.

143 Art. 3 (6), Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods.

144 Art. 6:228 BW.

145 On the basis of Art. 6:162 BW. See Hijma 2018, p. 570-571.

146 Art. 6:193j BW. Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market defines what commercial practices must be considered 'unfair', but does not, at present, require the national legislature to introduce the possibility to rescind the contract for that reason, with retroactive effect. In the near future, a right to termination for breach of the Unfair Commercial Practices Directive will have to be made available by the Member States, see Art. 3 of the Directive concerning the better enforcement and modernisation of Union consumer protection rules.

147 Art. 6:258 BW.

148 See *supra* section 2.5.

We have seen that these rights are not mutually exclusive, but complementary.[149] The Union legislature does not, however, require the claimant to elect between the rules, but only prescribes that the compensation or price reduction granted on one legal basis and the compensation or price reduction granted on another legal basis 'shall be deducted from each other in order to avoid overcompensation'.[150]

Overcompensation is also avoided, as much as possible, by the Court of Justice. It will be remembered that the Court has determined that the amount of 'fair compensation' which must be paid for the use of protected works must always be linked to the actual losses sustained by the authors of those works, regardless of the legal basis of the claim.[151] The same reasoning has been followed by the Court with regard to the amount of compensation which must be paid by the principal to his commercial agent after termination of their contract. Even though the agent is, in principle, entitled to claim damages on the basis of the applicable national law,[152] this may not result 'in the agent being compensated twice for the loss of commission following termination of that contract'.[153] Consider also the Late Payment Directive, which entitles the creditor both to a 'fixed sum of EUR 40' to compensate the creditor's 'own recovery costs'[154] and also to 'reasonable compensation' for 'any recovery costs exceeding that fixed sum'.[155] The Court has made clear that these claims may be combined, provided that the award of 'reasonable compensation' does not cover the costs which have already been compensated for by way of the fixed sum of EUR 40.[156]

If we wish to avoid both under- and overcompensation we should, indeed, examine carefully whether the applicable rules are aimed at repairing the same type of loss. This is not an easy task, as may be demonstrated by examining Regulation (EC) No 261/2004 in more detail. Article 12 (1) of this regulation permits air passengers to claim 'further compensation' on the basis of national and international laws,[157] in addition to the

149 See *supra* section 6.2.

150 Art. 14 (5), Directive (EU) 2015/2302 on package travel and linked travel arrangements.

151 Case C-572/13, *Hewlett-Packard Belgium v. Reprobel*, ECLI:EU:C:2015:750, at 35-39, referring to Case C-467/08, *Padawan v. SGAE*, ECLI:EU:C:2010:620, at 37, 40 and 42.

152 Art. 17 (2) (c), Council Directive 86/653/EEC relating to self-employed commercial agents, as interpreted in Case C-338/14, *Quenon v. Citibank and Citilife*, ECLI:EU:C:2015:795, at 31.

153 Case C-338/14, *Quenon v. Citibank and Citilife*, ECLI:EU:C:2015:795, at 35.

154 Art. 6 (1), Directive 2011/7/EU on combating late payment in commercial transactions. The precise conditions under which the liability itself is created are laid down in Art. 3-4, Directive 2011/7/EU on combating late payment in commercial transactions.

155 Art. 6 (3), Directive 2011/7/EU on combating late payment in commercial transactions.

156 Case C-287/17, *Česká pojišťovna v. WCZ*, ECLI:EU:C:2018:707, at 30-31; Case C-131/18, *Vanessa Gambietz v. Erika Ziegler*, ECLI:EU:C:2019:306, at 22-25.

157 Case C-83/10, *Aurora Sousa Rodríguez and Others v. Air France*, ECLI:EU:C:2011:652, at 38; Joined Cases C-581/10 and C-629/10, *Emeka Nelson and Others v. Deutsche Lufthansa AG* (C-581/10), *and TUI Travel and Others v. Civil Aviation Authority* (C-629/10), ECLI:EU:C:2012:657, at 59; Case C-354/18, *Rusu and Rusu v. SC Blue Air – Airline Management Solutions*, ECLI:EU:C:2019:637, at 36.

compensation which must be paid by the carrier on the basis of the regulation.[158] According to the Court, the purpose of this provision is to ensure that passengers 'are compensated for the entirety of the damage that they have suffered due to the failure of the air carrier to fulfil its contractual obligations'.[159] Meanwhile, the same provision determines that the compensation granted under the regulation 'may be deducted' from the compensation owed on another legal basis.[160] But when should this solution be applied?

The question to consider is whether the applicable rules are aimed at repairing the same type of loss. The Court itself has explained that the compensation granted under the regulation is aimed at repairing the 'inconvenience' resulting from the 'loss of time' suffered by all passengers whose flights are delayed.[161] The regulation is not aimed at repairing the 'individual damage' of each passenger, which requires an assessment of the circumstances of each case.[162] If we follow this reasoning and assume that the rules are aimed at repairing different types of loss, then surely we cannot conclude that the amount of compensation should always be adjusted.[163] Such a solution would prevent overcompensation in some cases, but may lead to undercompensation in other cases.

Indeed, the Court of Justice has recently confirmed that Article 12 (1) permits, but does not oblige, the national courts to deduct the compensation granted under the regulation from the compensation granted on another legal basis.[164] Bearing in mind that the purpose of Article 12 (1) is to ensure that the entirety of the damage is compensated, it should remain possible,

158 Art. 4-7, Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, as interpreted in Joined Cases C-402/07 and C-432/07, *Sturgeon v. Condor Flugdienst*, ECLI:EU:C:2009:716.

159 Case C-83/10, *Aurora Sousa Rodríguez and Others v. Air France*, ECLI:EU:C:2011:652, at 38.

160 Passengers are not, therefore, 'free to receive double recovery', as Dempsey & Johansson 2010, p. 219, observe.

161 Case C-344/04, *IATA and ELFAA*, ECLI:EU:C:2006:10, at 43; Joined Cases C-581/10 and C-629/10, *Emeka Nelson and Others v. Deutsche Lufthansa AG* (C-581/10), *and TUI Travel and Others v. Civil Aviation Authority* (C-629/10), ECLI:EU:C:2012:657, at 51-53.

162 Case C-344/04, *IATA and ELFAA*, ECLI:EU:C:2006:10, at 43; Joined Cases C-581/10 and C-629/10, *Emeka Nelson and Others v. Deutsche Lufthansa AG* (C-581/10), *and TUI Travel and Others v. Civil Aviation Authority* (C-629/10), ECLI:EU:C:2012:657, at 53.

163 This conclusion has also been drawn by Radoševic 2013, p. 106; Van der Bruggen 2016, p. 597-599. Doubts have also been expressed by De Vos 2012, p. 173-174.

164 Case C-354/18, *Rusu and Rusu v. SC Blue Air – Airline Management Solutions,* ECLI:EU:C:2019:637, at 44-47.

then, to combine the claims, subject only to the requirement that the passenger is not compensated twice for the inconvenience resulting from a loss of time.[165]

6.7 The second exception: exclusive rules

The previous section has demonstrated that, although each rule must be considered on its own merits, an election is nonetheless required if the rules lead to outcomes which cannot exist concurrently. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. For the same reason, Union law sometimes dictates that one of the rules takes priority, so that no election can be made at all. If the Union legislature has intended a particular rule to govern a particular situation exhaustively, it should not be possible to avoid the application of this rule by relying upon another applicable rule.

Consider the Product Liability Directive as an example. It may be remembered that this directive seeks to achieve a 'complete harmonisation' of the strict liability of producers and suppliers for certain damage caused by the defective products they have produced or supplied.[166] The Court has confirmed that it is not possible to change the conditions under which these parties can be held strictly liable. Member States may not, for instance, provide that damage to an item of property intended and used for private use or consumption must always be compensated, because the directive itself sets a threshold of EUR 500.[167] Member States may

165 The same solution has been proposed by Van der Bruggen 2016, p. 600-602, who, like Dempsey & Johansson 2010, p. 219, considers the compensation granted by the regulation to be part of the total compensation owed on the basis of Art. 19 of the Convention for the Unification of Certain Rules for International Carriage by Air ('Montreal Convention'), even though the Court has ruled that the compensation under the regulation cannot be qualified as 'damage occasioned by delay' within the meaning of Art. 19 of the Montreal Convention (see Joined Cases C-581/10 and C-629/10, *Emeka Nelson and Others v. Deutsche Lufthansa AG* (C-581/10), *and TUI Travel and Others v. Civil Aviation Authority* (C-629/10), ECLI:EU:C:2012:657, at 49). The relationship between Regulation No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and the Montreal Convention is not examined here, but forms the subject of De Graaff 2014b.

166 Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 24; Case C-154/00, *Commission v. Greece*, ECLI:EU:C:2002:254, at 20; Case C-402/03, *Skov v. Bilka*, ECLI:EU:C:2006:6, at 23; Case C-127/04, *Declan O'Byrne v. Sanofi Pasteur*, ECLI:EU:C:2006:93, at 35; Case C-285/08, *Leroy Somer v. Dalkia France and Ace Europe*, ECLI:EU:C:2009:351, at 21; Case C-495/10, *Centre hospitalier universitaire de Besançon v. Thomas Dutrueux and Caisse primaire d'assurance maladie du Jura*, ECLI:EU:C:2011:869, at 20; Case C-310/13, *Novo Nordisk Pharma*, ECLI:EU:C:2014:2385, at 23; Case C-621/15, *Sanofi Pasteur and Others*, ECLI:EU:C:2017:484, at 20.

167 Art. 9 (b), Council Directive 85/374/EEC concerning the liability for defective products, as interpreted in Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 26-35.

not require the producer to prove that he has taken appropriate steps to avert the consequences of a defective product either, if such action is not required in order to benefit from the exemptions laid down in the directive.[168] Nor are Member States permitted to provide that a supplier can generally be held liable under the same conditions as the producer, because the directive deliberately allocates the strict liability for damage caused by defective products to producers and only shifts this burden to suppliers in exceptional cases.[169] Finally, Member States are not permitted to extend the limitation period applicable to the right to claim compensation beyond the periods provided for under the directive.[170]

However, directives and regulations aimed at 'complete harmonisation' do not always have priority. It may be recalled that such instruments may leave room for the application of other rules.[171] In the present context, it must be observed that such rules may even take precedence over a regime aimed at complete harmonisation. Consider the UCP Directive, which fully harmonises the rules on unfair business-to-consumer commercial practices. Member States are not permitted, therefore, to depart from the provisions of the directive when determining whether a commercial practice is unfair.[172] But Article 3 (4) of the UCP Directive also states:

> 'In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.'[173]

168 Art. 7 (d) and (e), Council Directive 85/374/EEC concerning the liability for defective products, as interpreted in Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 42-48.

169 Art. 3 (3), Council Directive 85/374/EEC concerning the liability for defective products, as interpreted in Case C-52/00, *Commission v. France*, ECLI:EU:C:2002:252, at 36-41; Case C-402/03, *Skov v. Bilka*, ECLI:EU:C:2006:6, at 22-45; Case C-127/04, *Declan O'Byrne v. Sanofi Pasteur*, ECLI:EU:C:2006:93, at 35-38; Case C-495/10, *Centre hospitalier universitaire de Besançon v. Thomas Dutrueux and Caisse primaire d'assurance maladie du Jura*, ECLI:EU:C:2011:869, at 24-26.

170 Art. 10, Council Directive 85/374/EEC concerning the liability for defective products, as interpreted in Case C-358/08, *Aventis Pasteur v. OB*, ECLI:EU:C:2009:744, at 37-44.

171 See section 6.5.

172 Joined Cases C-261/07 and C-299/07, *VTB-VAB v. Total Belgium* (C-261/07) *and Galatea v. Sanoma Magazines Belgium* (C-299/07), ECLI:EU:C:2009:244, at 52-68; Case C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs v. Plus Warenhandelsgesellschaft*, ECLI:EU:C:2010:12, at 41-54; Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag & Co. v. 'Österreich'-Zeitungsverlag*, ECLI:EU:C:2010:660, at 29-41; Case C-288/10, *Wamo v. JBC and Modemakers Fashion*, ECLI:EU:C:2011:443, at 32-40; Case C-206/11, *Georg Köck v. Schutzverband gegen unlauteren Wettbewerb*, ECLI:EU:C:2013:14, at 34-50; Case C-343/12, *Euronics Belgium v. Kamera Express*, ECLI:EU:C:2013:154, at 23-31; Case C-421/12, *Commission v. Belgium*, ECLI:EU:C:2014:2064, at 55-78; Case C-295/16, *Europamur Alimentación*, ECLI:EU:C:2017:782, at 39-43.

173 Art. 3 (4), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

Surely this statement should not be taken to mean that other Union rules must always be applied at the expense of the UCP Directive. To begin with, Article 3 (4) only applies when other Union rules govern 'specific aspects of unfair commercial practices'. Consider the Universal Services Directive as an example. This directive determines the information which must be inserted in a contract concluded between a consumer and an electronic communications services provider and gives the consumer the power to withdraw from the contract when the conditions change.[174] The directive does not, however, determine that non-compliance with these information requirements constitutes an unfair commercial practice. What is more, the provisions of the directive apply 'without prejudice to Community rules on consumer protection'.[175] For these reasons, the Court has determined that the Universal Services Directive does not regulate 'specific aspects' of unfair commercial practices. If the facts of the case fall within the scope of the Universal Services Directive, the UCP Directive may nonetheless be applicable.[176]

What is more, Article 3 (4) merely determines that 'specific' rules shall prevail where they 'conflict' with the UCP Directive. In the view of the Court, the term 'conflict' indicates that there must be a 'divergence which cannot be overcome by a unifying formula enabling both situations to exist alongside each other'.[177] In principle, then, the specific rules should be applied cumulatively with the provisions of the UCP Directive, provided that the necessary conditions have been fulfilled.[178] In accordance with this principle, the Court has tried to realise the objectives underlying the UCP Directive and the Directive concerning the advertising of medicinal products to the greatest possible extent.[179] Even though the Court qualified the first directive as the *lex generalis* and the second directive as the *lex specialis*,[180] it also observed that the directives have a 'complementary

174 Art. 20 (2)-(4), Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

175 Art. 20 (1), Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

176 Joined Cases C-54/17 and C-55/17, *Autorità Garante della Concorrenza e del Mercato v. Wind Tre* (C-54/17) *and Vodafone Italia* (C-55/17), ECLI:EU:C:2018:710, at 65-70.

177 Joined Cases C-54/17 and C-55/17, *Autorità Garante della Concorrenza e del Mercato v. Wind Tre* (C-54/17) *and Vodafone Italia* (C-55/17), ECLI:EU:C:2018:710, at 60, referring to Opinion A-G Campos Sánchez-Bordona, Joined Cases C-54/17 and C-55/17, *Autorità Garante della Concorrenza e del Mercato v. Wind Tre* (C-54/17) *and Vodafone Italia* (C-55/17), ECLI:EU:C:2018:377, at 124 and 126.

178 Also observed by Keirsbilck 2011, p. 173-195.

179 Directive 2001/83/EC on the Community code relating to medicinal products for human use.

180 Joined Cases C-544/13 and C-545/13, *Abcur v. Apoteket and Farmaci*, ECLI:EU:C:2015:481, at 80.

nature'.[181] After all, the Union legislature itself has determined that a commercial practice may be qualified as misleading, and hence as 'unfair' within the meaning of the UCP Directive,[182] if the specific rules concerning the advertising of medicinal products have not been complied with.[183]

According to the Court, a conflict is present only when the 'specific' rules impose obligations upon undertakings 'which are incompatible with (…) Directive 2005/29' and leave them 'no margin of discretion' at all.[184] This was the case with the information requirements concerning the energy consumption of products. Before the Antwerp Commercial Court, the company Dyson had complained that its competitor BSH had not accurately informed consumers about the efficiency of its vacuum cleaners. Dyson argued that BSH should have provided consumers with information on the conditions under which the products had been tested in order to determine their efficiency. BSH replied that it had merely followed the Union rules governing energy labelling, which did not require such testing conditions to be mentioned.[185] Indeed, the Court confirmed that these Union rules govern 'specific aspects' of unfair commercial practices[186] and that they establish 'an exhaustive list of information' which must be brought to the attention of consumers.[187] No additional information requirements may be imposed on the basis of the UCP Directive.[188]

What if a particular situation has not been exhaustively regulated by the Union legislature? It may be recalled that, in such situations, the Member States are permitted to go beyond the requirements introduced at the European level. The discretion granted to them is not, however, unlimited. Member States must, in any event, ensure the level of protection prescribed

181 Joined Cases C-544/13 and C-545/13, *Abcur v. Apoteket and Farmaci*, ECLI:EU:C:2015:481, at 78, referring to Opinion A-G Szpunar, Joined Cases C-544/13 and C-545/13, *Abcur v. Apoteket and Farmaci*, ECLI:EU:C:2015:136, at 61.

182 Art. 7 in conjunction with Art. 5 (4) (a), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

183 Joined Cases C-544/13 and C-545/13, *Abcur v. Apoteket and Farmaci*, ECLI:EU:C:2015:481, at 78. The Court refers to Art. 7 (5), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, which determines that information requirements flowing from Union law in relation to commercial communication 'shall be regarded as material'. In Annex II, which contains a non-exhaustive list of such requirements, reference is made to Directive 2001/83/EC on the Community code relating to medicinal products for human use.

184 Joined Cases C-54/17 and C-55/17, *Autorità Garante della Concorrenza e del Mercato v. Wind Tre* (C-54/17) *and Vodafone Italia* (C-55/17), ECLI:EU:C:2018:710, at 61.

185 Directive 2010/30/EU on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, and Commission Delegated Regulation (EU) No 665/2013 supplementing Directive 2010/30/EU with regard to energy labelling of vacuum cleaners. The current framework is established by Regulation (EU) 2017/1369 setting a framework for energy labelling.

186 Case C-632/16, *Dyson v. BSH Home Appliances*, ECLI:EU:C:2018:599, at 33.

187 Case C-632/16, *Dyson v. BSH Home Appliances*, ECLI:EU:C:2018:599, at 44.

188 Case C-632/16, *Dyson v. BSH Home Appliances*, ECLI:EU:C:2018:599, at 46.

by the directive or regulation at issue.[189] And if they adopt or retain more protective rules, these rules must still comply with the rules belonging to the body of primary Union law.[190] In practice, this means that the defendant may argue that the national rule upon which the claimant relies must be set aside because it is contrary to treaty provisions pertaining to, for instance, the prohibition of discrimination[191] or the free movement of workers, the freedom of establishment or the freedom to provide services.[192]

6.8 Conclusion

This chapter has examined the relationship between rules originating from harmonising measures and the relationship between these measures and otherwise applicable national laws. In this context, it is generally assumed that harmonising measures introduce uniform legal regimes embracing all the Member States and replace or exclude otherwise applicable laws. This chapter has aimed to provide a more complete and nuanced account of the relationship between these rules.

A careful assessment of the statements made by the Union legislature and by the Court of Justice of the European Union has shown that the existence of one rule does not, in principle, affect the scope of application of another rule. On the contrary, the assumption is that each rule must be assessed independently and that no rule should be excluded from the outset. The Union legislature has regularly expressed itself in favour of this assumption by holding explicitly that the adoption of a directive or regulation shall not affect the scope of application of other harmonising measures and national laws. The Court, for its part, strives to realise the objectives underlying each rule to the greatest possible extent. In the absence of express statements by the Union legislature, the Court assumes that each rule ought to have its intended legal effect. Accordingly, rules may be applicable concurrently if the conditions of each rule have been established.

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189 See e.g., in the context of Council Directive 87/102/EEC concerning consumer credit, Case C-429/05, *Max and Marie-Jeanne Rampion v. Franfinance*, ECLI:EU:C:2007:575, at 47; Case C-76/10, *Pohotovosť v. Iveta Korčkovská*, ECLI:EU:C:2010:685, at 66.

190 E.g. Case C-322/01, *Deutscher Apothekerverband*, ECLI:EU:C:2003:664, at 64; Case C-205/07, *Lodewijk Gysbrechts v. Santurel Inter BVBA*, ECLI:EU:C:2008:730, at 34, both concerning the interpretation of Art. 14 (1), Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts. See also Case C-265/12, *Citroën Belux v. FvF*, ECLI:EU:C:2013:498, at 31, concerning the interpretation of Art. 3 (9), Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

191 Laid down in Art. 18 TFEU, protected as a fundamental right under Art. 21 of the Charter and recognised as general principle of Union law. See *supra* sections 4.3 and 5.2.

192 Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 33, with references to earlier case law. See *supra* section 4.3.

This does not mean that concurrently applicable rules will always coexist peacefully. This chapter has shown that an exception must be made when cumulative application would lead to inconsistent outcomes. In such situations, an election between the available alternatives is required. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. For the same reason, Union law sometimes dictates that one of the rules applies exclusively, so that no election can be made at all. If the Union legislature has intended a particular rule to govern a particular situation exhaustively, it should not be possible to avoid the application of this rule.

Meanwhile, it is clear that the existence of alternative and exclusive rules is an exception which requires justification. The applicability of one rule is only affected by another rule to the extent that this is necessary in order to realise the intentions of the Union legislature. Rules with a higher constitutional rank do not, therefore, automatically exclude the application of rules lower down the hierarchy. Nor do measures aimed at achieving 'complete harmonisation' automatically replace other rules, originating from harmonising measures or from the applicable national law.

It flows from the foregoing that the party concerned – usually the claimant – may rely on the most advantageous rule – usually a specific cause of action – unless the rules are incompatible or one of them applies exclusively. We have seen that the benefit of this choice may nonetheless be affected, because the content of one rule might affect the content of another rule. The existence of an unfair commercial practice may, for instance, be taken into account when assessing the unfairness of contractual terms. This does not mean that the rules are identical in all respects, nor that one of the rules is swallowed up by the other. The rules continue to exist side by side, in accordance with the principle that the objectives underlying each rule should be realised to the greatest possible extent.

7 General Conclusion

7.1 Concurrence all over the place

Private relationships are governed by many different rules, ranging from open-textured standards of general application to detailed rules aimed at specific situations. These rules originate from various sources of law. They are embedded in the national systems of private law, each with their own features and preferences.[1] But private relationships are also, and increasingly so, governed by the rules of the European Union. These rules are contained in binding agreements concluded by the Member States, such as the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights. Some rules have been developed by the Court of Justice of the European Union as part of the unwritten body of Union law. And many rules have their origins in directives and regulations governing areas as diverse as social policy, consumer protection, competition law, transport, public health, and the internal market more broadly.[2]

In this multi-level legal order, it is not unusual for a single set of facts to fall within the ambit of multiple Union rules nor is it uncommon that, on the face of it, national laws may provide protection as well. Such a concurrence of rules does not give rise to problems as long as their application produces the same outcome. We have seen, however, that the rules may vary in important ways, both in terms of their conditions and in terms of their consequences, which may lead to different outcomes. In such situations, the question that arises is whether the law permits the interested party to elect the rule of his choice. This question can only be answered by considering the relationship between the underlying rules. Does one legal rule affect the scope of application of another legal rule? Can the rules be applied cumulatively, or must one of them be excluded in favour of the other? Does the law permit a choice between the rules?

If we wish to find the appropriate answers to these questions, it is important to first specify which categories of rules we are focusing on. Indeed, this has been the first leg of our journey.[3] Carrying out this task required us to steer a middle course between the categories used within the national legal systems and the categories used within the Union legal

1 Section 1.2.
2 Section 4.2.
3 Sections 1.3 and 2.2-2.3.

order.[4] Given the ultimate objective of this book, which is to examine whether the scheme of analysis conceived and fostered in the context of the national systems of private law can be valued as a source of understanding of the laws of the European Union, we have not pressed the whole of the law into the moulds of one of the existing systems of private law. Although the book does examine Dutch, English, French and German law, we have not chosen one of these systems as our leading model. The aim to achieve an autonomous interpretation has not, however, led us to adopt uncritically the vocabulary used by the Union legislature and by the Court of Justice either. We have tried to avoid using indiscriminate 'rights and duties'-talk where possible and have instead sought to inform the reader, as accurately as appropriate in the context of this book, about the kinds of rights and duties we are focusing on.

To this end, we have taken advantage of the works of Wesley Newcomb Hohfeld (1879-1918). In line with his structure of correlatives, we have used the term *claim* to refer to rules which entitle a person to some performance from another person. Prominent examples include the claim for specific performance and the claim for compensation. We have used a different term – *power* – to refer to the capacity of a person to unilaterally create, modify or extinguish a legal position or relationship, and so to create, modify or extinguish claims and powers. The examples which have been discussed include the termination of a contract for breach and the rescission of a contract for pre-contractual misrepresentation. In line with Hohfeld's guiding thesis – legal problems can only be understood in terms of legal relations – we have also paid attention to the rules beneficial to the persons affected by the enforcement of a claim and the exercise of a power. They may be able to contest the proposition that a valid claim or power exists by relying, for instance, on grounds of justification and exemption. We have used the term *defence* to refer to these rules.[5]

This book has shown that current Union law contains a great number of claims, powers, and defences. Private conduct may, under certain circumstances, be assessed against the general prohibition of discrimination on grounds of nationality, against certain free movement provisions, and against competition rules. In fact, the Court of Justice has worked out several claims in great detail. The claim for compensation in respect of losses resulting from infringements of EU competition law is well-known. Recently, the Court has also developed two claims on the basis of the Charter of Fundamental Rights: the claim for an allowance in lieu of annual leave not taken upon termination of the employment relationship, and the claim for compensation for losses resulting from unequal treatment.[6]

4 Sections 1.2-1.3.
5 Sections 1.3 and 2.3.
6 Section 4.3.

As far as secondary Union law is concerned, this book has provided an overview of the directives and regulations which enable individuals to claim some form of performance from another individual, such as specific performance and monetary compensation. In addition, several directives and regulations enable individuals to create, modify or extinguish a legal position or relationship. The power of the consumer to withdraw from a contract is a case in point. Adopting the angle of view of the person affected, the book has also shown that Union law provides individuals with a range of defences, such as the *state-of-the-art* defence against a claim for compensation in respect of losses caused by a defective product and the *passing-on* defence against a claim for compensation in respect of losses resulting from an infringement of competition law.[7]

7.2 Fundamental assumptions challenged

The relationship between these claims, powers, and defences is often explained and understood on the basis of three fundamental assumptions: Union laws have precedence over national laws, harmonising measures replace national laws, and specific rules have priority over general rules.[8] What these assumptions have in common is that precedence is given to one of the rules on the basis of a formal criterion. This book has questioned this approach and has submitted that the substance of the rules should be taken into account, and not merely their formal relationship.

Consider the maxim *lex specialis derogat legi generali*, well-known in the systems of private law and Union law alike. Many lawyers contend that a specific rule should prevail over a general rule if both relate to the same subject matter. However, this book has warned that this maxim is not self-evident. To begin with, the maxim can only be relied upon when one rule is really general and another rule is truly specific. It is submitted that this is only the case when the specific rule contains all the elements of the general rule and at least one additional element. In other words, the general rule must embrace all the cases falling within the scope of the specific rule, but the specific rule may not embrace all the cases falling within the scope of the general rule. If the differences between the rules cur both ways, it is impossible to generally qualify one of them as the *lex specialis* and the other as the *lex generalis*.[9]

The latter point has been illustrated by examining the relationship between Article 18 TFEU and the provisions governing the free movement of persons and services in more detail. It is generally assumed that Article 18 TFEU is the *lex generalis* and that the free movement provisions must be

7 Section 4.4.
8 Section 1.1.
9 Sections 2.4, 5.2.4, 6.3, and 6.7.

considered *leges speciales*. And it is true that the Court of Justice has repeatedly held that the general prohibition of all discrimination on grounds of nationality has been given 'specific expression' by these free movement provisions, and has added that the violation of one of these free movement rights implies that Article 18 TFEU has been violated too.[10] However, this book has argued that Article 18 TFEU cannot be characterised as the all-embracing *lex generalis* anymore. The reason is that the Court of Justice has replaced the concept of discrimination with the broader concept of restriction in the context of the law of free movement,[11] but has so far refused to adopt the same approach in the context of Article 18 TFEU.[12] It is against this backdrop that we have argued that the free movement provisions can no longer be considered the *leges speciales* as compared with the general prohibition of all discrimination on grounds of nationality. Not every restriction of free movement is governed by Article 18 TFEU anymore.

But even if a general rule does embrace all the cases falling within the scope of a specific rule, there is really no compelling reason why the specific rule should automatically trump the application of the general rule. The overlap can be considered harmless if the specific rule merely complements the general rule. We have seen, for instance, that the directives regulating specific aspects of unfair commercial practices complement the general Unfair Commercial Practices Directive, so that both may be applicable to a single set of facts.[13] An exception must be made, however, when general and specific rules conflict. In such situations, one of the rules should be excluded in order to do justice to the objectives underlying the other rule. Whether that is the case, and whether the specific or the general rule should then prevail, is a question of interpretation which must be answered by considering the substantive importance of the rules at issue, in the light of the circumstances of each individual case.[14]

Likewise, we should avoid jumping to the conclusion that Union law sets aside otherwise applicable national laws. It must be stressed at once that this book has not questioned the capacity of Union law to produce this effect. In fact, we have paid much attention to the exclusionary effects of Union law. However, the book has also warned that Union rules do not automatically trump rules lower down the hierarchy. The principle of primacy is essentially a rule of conflict. It does tell us which law must have priority in the event of conflicts, but it does not tell us how we should determine whether a conflict actually exists. This is a question of interpretation which cannot be answered by merely referring to the formal relationship between the rules at issue.[15]

10 Section 5.2.2.
11 Section 5.2.3.
12 Section 5.2.4.
13 Section 6.7.
14 Sections 2.4, 5.2.5, 6.3, and 6.7.
15 Section 4.5.

Equally, we should proceed with caution when determining the relationship between the directives and regulations adopted by the Union legislature and otherwise applicable laws. It cannot be denied, of course, that these harmonising measures aim to introduce a uniform legal regime embracing all the Member States. But this does not mean that these measures necessarily replace or exclude otherwise applicable laws. This book has shown that the scope of application of directives and regulations is limited, because the competence of the Union is limited and because the Union legislature does not regulate all issues exhaustively. Sometimes, the very treaty provision upon which the competence of the Union legislature is based prescribes that any harmonising measure can only ever establish minimum requirements. In many other instances, the wording, meaning and purpose of the directive or regulation itself must be examined in order to determine the extent by which the Union legislature has actually exercised its competence to legislate.[16]

7.3 A shared scheme of analysis

How should we, then, establish whether the law permits the interested party to elect the rule of his choice? Inspired by the experiences gained from examining several national systems of private law, this book has offered a method of interpretation which can be used to answer this question. Indeed, one of our conclusions is that the systems of private law which have been considered – Dutch, English, French, and German law – share a scheme of analysis by which questions of concurrence can be debated and solved.[17]

In accordance with this scheme, the existence of one rule does not, in principle, affect the scope of application of another rule. The underlying reason is that the objectives of each rule should be realised to the greatest possible extent. It is assumed, therefore, that each rule ought to have its intended legal effect if the necessary elements have been established. It flows from this reasoning that concurrently applicable rules may be applied cumulatively as soon as the conditions of each rule have been established. We have seen that lawyers from different jurisdictions refer to this solution with the terms 'cumulation' and 'combination'. Indeed, they start from the premise that claims, powers, and defences can be accumulated if the party concerned so wishes.

However, rules cannot always coexist peacefully. This book has shown that an exception must be made when cumulative application would lead to inconsistent outcomes. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. One simply cannot blow hot and cold. It may be recalled, for instance, that it is impossible

16 Sections 4.5, 6.2-6.5.
17 Section 2.5.

to combine termination for breach and specific performance of the same contract. As termination means that the duty to perform the obligations under the contract ceases to exist, the exercise of this power implies that specific performance of these obligations cannot be claimed anymore. In such situations, an election between the alternatives is required. Lawyers from different jurisdictions refer to this situation with terms such as 'option', 'alternativity', and 'election'.

These examples indicate that another persistent theme runs through this scheme of analysis. In principle, it is up to the party concerned to rely upon the rule of his choice, be it a claim, a power, or a defence. Even if the rules cannot be applied concurrently, because this would lead to inconsistent outcomes, the law permits the party concerned to make an election. One reason why the law does not impose a choice may be that it is impossible to generally qualify one of the rules as more advantageous to the claimant or defendant, precisely because the conditions and consequences of each rule differ. But we can also think of another, more fundamental explanation. It is for reasons of party autonomy that the law does not, and should not, decide which rule must be applied. In principle, it is up to the person concerned to opt for the rule which appears to him to be the most advantageous.

We have seen that the benefit of this choice may nonetheless be affected, because the content of one rule might influence the content of another rule. Standards applicable in one context may be adopted in another context, and time limits restricting the enforcement of one right may also restrict the enforcement of another right. It may be recalled that this technique has been used by the supreme courts in all the jurisdictions under consideration. Rather than excluding one of the applicable rules altogether, the courts prefer to adjust their respective scopes of application. They permit the claimant to benefit from the application of the rule of his choice, but also take into account the arguments put forward by the defendant, even if the rules belong to a different legal regime. This does not mean that the rules are identical in all respects, nor that one of the rules is swallowed up by the other. The rules continue to exist side by side, in accordance with the principle that the objectives underlying each rule should be realised to the greatest possible extent.[18]

Sometimes, however, the law does dictate that one of the rules takes priority, so that no election can be made at all. If the legislature has intended a particular rule to govern a particular situation exhaustively, it should not be possible to avoid the application of this rule by relying upon another rule. Lawyers from different jurisdictions refer to this situation with terms such as 'exclusivity' and 'exclusion'. Their writings indicate that this solution is applied with great restraint. A total rejection of concurrence is considered to be an unnecessarily blunt instrument. The applicability of one rule is only affected by another rule to the extent that this is necessary in order

18 Section 2.5.

to do justice to the intentions of the legislature. Our analysis shows that the courts tend to reduce the restrictions imposed by the prioritised rule to a minimum and retain as much of the other rule as possible.

Of course, every case may spark a debate about whether the law permits a choice between the rules. The outcome may differ depending on the content of the rules and the structure of the legal system. This book has illustrated this point by discussing a classic example: the relationship between the laws of contract and tort.[19] How to explain that only French courts generally exclude the possibility to claim in tort if the damage is caused by or related to the performance, or non-performance, of a contractual obligation? It may be recalled that this choice has not only been made out of a genuine concern for the freedom of contract and the will of the legislature, but also to protect contracting parties against the general strict liability for things conceived and fostered by the courts themselves. Likewise, the German, Dutch and English courts have sought to offer contracting parties additional protection on the basis of the law of tort when the law of contract appeared to be too rigid.

The example shows that a legal problem which appears, on the face of it, to be the same may turn out to have a different nature and scope in different jurisdictions. It is submitted that this finding does not call into question our scheme of analysis as such. Rather, the example illustrates that questions of concurrence are questions of interpretation which may be answered differently, depending on the scope and structure of the relevant rules.

7.4 Understanding the laws of the European Union

Can this scheme of analysis, conceived and fostered within the systems of private law, be valued as a source of understanding of the laws of the European Union? This was the principal question which this book aimed to answer. To this end, the book has carefully examined the statements issued by the Union legislature and by the Court of Justice of the European Union about the availability of the claims, powers, and defences relevant to private parties. Can we see the same principles at work?

We have seen that the conduct of individuals which falls within the scope of Union law is, in principle, subject to all the requirements flowing from the treaty provisions pertaining to non-discrimination, free movement of persons and services, and competition law.[20] In fact, a host of judgments shows that the applicability of one treaty provision does not, in principle, affect the scope of application of another treaty provision. The Court has made clear, for instance, that Articles 101 and 102 TFEU are not mutually exclusive, but complementary.[21] Likewise, the Court has determined that

19 Chapter 3.
20 Sections 5.2.4 and 5.4.3.
21 Section 5.3.5.

the scope of application of the provisions governing the free movement of persons and services is not affected by the rules in the area of competition, and *vice versa*.[22] It is against this backdrop that we may conclude that the Court proceeds from the assumption that the rules of primary Union law may be applicable concurrently, provided, of course, that the necessary conditions have been fulfilled.

The same theme runs through the body of secondary Union law. We have seen that the Union legislature regularly confirms that the adoption of a directive or regulation shall not affect the scope of application of other harmonising measures. This book has shown that such explicit statements play an important role once a legal dispute must be resolved. They form a reason for the Court of Justice to assume that each rule must be assessed independently and that no rule should be excluded in advance.[23] In fact, the Court has made clear that the scope of application of one rule will only be affected by another rule if this is clearly provided by the Union legislature. In the absence of express indications on the part of the Union legislature, the conclusion must be that each rule ought to have its intended legal effect.[24] It flows from this reasoning that harmonised rules may, in principle, be applicable concurrently if their respective conditions have been established.

This book has submitted that this principle does not only apply when the relationship between rules originating from harmonising measures must be determined, but also when the relationship between these measures and otherwise applicable national laws must be determined. After all, the competence of the Union to legislate is restricted by the Treaties and the Union legislature does not regulate all issues exhaustively. In fact, we have seen that many directives and regulations are only aimed at so-called 'minimum' harmonisation, which means that Member States may adopt or retain a higher level of protection in their national legal systems. This book has shown that this regulatory technique leaves considerable room for the application of claims, powers, and defences based on the applicable national law.[25]

An examination of the substance of the rules involved should also be conducted if the directives and regulations aim at a 'complete' harmonisation of the laws of the Member States. These harmonising measures are also limited in scope. They might exhaustively regulate some issues, but they cannot be wholly autonomous and self-contained. The Product Liability Directive, for instance, fully harmonises the strict liability of producers and sellers, but still leaves considerable room for the application of national systems of contractual and non-contractual liability. Likewise, the Unfair Commercial Practices Directive, the Consumer Credit Directive, the Consumer Rights Directive, the revised Consumer Sales Directive, and the

22 Section 5.4.3.
23 Section 6.2.
24 Section 6.3.
25 Section 6.4.

newly introduced Directive concerning contracts for the supply of digital content and digital services generally prohibit Member States to depart from their respective provisions, but also leave important issues to the applicable national law, such as the rules on the validity, formation or effect of a contract.[26] Rather than assuming that measures aimed at 'complete' harmonisation exclude otherwise applicable national laws, we should, therefore, start from the premise that each rule, however founded, must be considered on its own terms.

This does not mean that concurrently applicable rules will always coexist peacefully. As is the case in the national systems of private law, an exception must be made when cumulative application would lead to inconsistent outcomes. On the basis of a host of examples derived from various harmonising measures, we may conclude that it is impossible, also as a matter of Union law, to combine termination for breach and specific performance of the same contract. In such situations, Union law requires an election between the available alternatives. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. It is submitted that this is generally not the case when a single set of facts falls within the scope of multiple liability rules. Of course, the claimant should not be able to recover double damages for the same loss. But there is no need to force the claimant to make an election, because most differences can be bridged at the stage of assessing the quantum of damages.[27]

It flows from the foregoing that the party concerned should, in principle, be free to elect the rule which appears to him to be the most advantageous. Consider, for instance, the case of anticompetitive contractual arrangements entered into by undertakings which together hold a dominant position on the relevant market. It will be remembered that Articles 101 and 102 TFEU are complementary, not mutually exclusive.[28] We may safely assume, therefore, that the aggrieved party may have a good claim for compensation against the dominant undertakings with respect to any of the infringements, provided that there is a causal relationship between the infringement in question and the harm suffered. It is readily arguable, then, that this party will have a choice to claim compensation for any of the infringements, subject only to a prohibition of double recovery of the same losses.[29]

As is the case in the national systems of private law, the content of one rule might affect the content of another rule. For instance, the nature and terms of an anti-competitive agreement may support the conclusion that a collective dominant position exists. We have also seen that the fact that certain conduct does not appreciably restrict competition under Article 101 (1) TFEU can be an indication that the same conduct does not infringe

26 Section 6.5.
27 Section 6.6.
28 Section 5.3.5.
29 Section 5.3.6.

Article 102 TFEU either.[30] Likewise, the existence of an unfair commercial practice within the meaning of the Unfair Commercial Practices Directive may be taken into account when assessing the unfairness of contractual terms within the meaning of the Unfair Terms Directive.[31] This does not, however, mean that one of the rules is excluded. Any solution must be found through an interpretation of the rule at issue and cannot, therefore, ignore the outer limits of that legal framework. Indeed, our analysis shows that the Court of Justice favours a convergent interpretation of concurrently applicable rules where possible, but is also careful not to conflate the legal texts.

Sometimes, Union law does dictate that one rule takes priority, so that no election can be made at all. If the drafters of the Treaties or the Union legislature have intended a particular rule to govern a particular situation exhaustively, it should not be possible to avoid the application of this rule by relying upon another rule. Within the body of primary Union law, the relationship between the general prohibition of discrimination on grounds of nationality and the free movement provisions governing persons and services provides a case in point. It may be recalled that we have argued that Article 18 TFEU cannot, in all situations, be considered the *lex generalis* and that the free movement provisions cannot, in all situations, be considered the *leges speciales*.[32] However, the book has also shown that if the facts do fall within the scope of application of one of the free movement provisions, the Court of Justice tends to assess the case only in the light of these provisions. To that extent, the scope of application of Article 18 TFEU is affected by the free movement provisions.[33]

The book has also demonstrated that it is not possible to avoid the application of a rule adopted by the Union legislature if this rule exhaustively regulates a certain situation of fact. It may be remembered, for instance, that the Product Liability Directive fully harmonises the strict liability of producers and sellers. In the view of the Court, it is not possible, therefore, to change the conditions under which these parties can be held strictly liable. Several other directives, such as the Unfair Commercial Practices Directive, the Consumer Credit Directive, the Consumer Rights Directive, and the revised Consumer Sales Directive, also prohibit Member States to depart from their respective provisions.[34]

Such statements should not, however, lead the reader to believe that the discretion granted to Member States by harmonising measures which aim at providing a 'minimum' level of protection is unlimited. Member States must, in any event, ensure the effectiveness of the directive or regulation at issue. And if they adopt or retain more protective rules, these rules will

30 Section 5.3.5.
31 Section 6.2.
32 Section 5.2.4.
33 Section 5.2.5.
34 Section 6.7.

have to comply with the rules belonging to the body of primary Union law. From the perspective of the individuals involved, this means that the rule upon which one of them relies may be set aside if it is contrary to the treaty provisions governing, for instance, the free movement of persons and services.[35]

In conclusion, our enquiry into the statements issued by the Union legislature and by the Court of Justice has revealed that the scheme of analysis, conceived and fostered within the systems of private law, can indeed be valued as a source of understanding of the laws of the European Union. In accordance with this scheme, we should start from the premise that each applicable rule, however founded, should be realised to the greatest possible extent. In principle, then, each rule ought to have its intended legal effect once the necessary conditions have been established. It flows from this reasoning that the party concerned should have a free choice as to which rule to rely upon. Two exceptions must be made, however. Union law requires an election between the available alternatives if cumulative application would lead to inconsistent outcomes which cannot exist concurrently. And sometimes Union law prescribes that one of the rules applies exclusively, so that no election can be made at all. The foregoing indicates that these exceptions are not self-evident, but can only be accepted after a careful enquiry into the wording, meaning and purpose of the provisions at issue.

7.5 Lessons learned and questions raised

This book started with the observation that scholars of private law and Union law tend to view the structure of the legal system from different angles. Many jurists specialised in private law, especially continental scholars, are thinking in terms of the institutional model inherited from Roman jurists. They seek to understand the world of persons and things, and the relations between them. By contrast, many scholars specialised in Union law are thinking in terms of the vertical structure of the legal order conceptualised by Hans Kelsen. For them, the core question is whether a rule, laid down by national law or Union law, can be validated, ultimately, by the constituent Treaties and by the Charter of Fundamental Rights of the European Union.[36]

We have tried to find a middle ground between these two ultimate positions. Inspired by the works of Hohfeld, we have focused on the legal relations between individuals and not on the institutional or hierarchical structure of the legal system as a whole. This book has demonstrated that Hohfeld's structure of correlatives can be used as a foundation for a more precise analysis of the rights and duties which individuals may derive from

35 Section 6.7.
36 Section 1.2.

the laws of the European Union. By providing a comprehensive overview of the claims, powers, and defences currently available as a matter of Union law, the book has shown that the impact of Union law on the legal relationships between individuals is profound. Our analysis confirms the trend, already observed in previous research, that the private enforcement of Union law is increasingly governed by Union law itself.[37]

If we wish to understand the relationship between these claims, powers, and defences, we should use a method of interpretation crafted with private relationships in mind. Inspired by the experiences gained from examining several national systems of private law, this book has offered a scheme of analysis which can be used to this end. Our inquiry into the statements issued by the Union legislature and by the Court of Justice has demonstrated that this scheme can be valued as a source of understanding of the laws of the European Union. The scheme accepts and accommodates the situations in which Union laws replace or exclude national laws, and the situations in which specific rules set aside rules more general in scope. Crucially, the scheme also absorbs the many situations in which rules do apply concurrently and provides a model by which the questions which may arise as a result of their overlap can be debated and solved. It is submitted that this scheme provides a complete and nuanced account of the impact of the laws of the European Union on private relationships, and of their interaction with the national systems of legal protection.

These findings are relevant to scholars and practitioners of private law and Union law alike. For them, it is important to understand how questions of concurrence are debated and solved. Practitioners, for instance, should be aware of the principle that the objectives underlying each rule should be realised to the greatest possible extent. It is against this backdrop that they should carefully examine all the legal possibilities before advising their clients, filing their court documents and drafting their decisions. For legislative lawyers, it is particularly important to be aware of the fact that a rule will generally only be excluded if an express derogation to that effect has been inserted in the legislative texts or if the overall meaning and purpose of the provisions at issue necessitate this conclusion. In the light of these findings, it is advised that the relationship with other legislative instruments is considered carefully when preparing legislative proposals.

Our findings may also be of interest for those participating in the ongoing debate about the nature of the Union legal order. It may be recalled that the Court of Justice has consistently held that the precedence of Union law is ultimately based on and limited by the founding Treaties of the Union. We have also noticed that this position has been challenged by a great number of supreme and constitutional courts. In their view, the precedence of Union law is ultimately based on and limited by the national

37 See e.g. Dougan 2011, p. 430 and 435-437; Wilman 2016, p. 890-896; Ackermann 2018, p. 758-763; De Graaff & Verheij 2019.

constitutions.[38] The Lisbon Treaty has contributed little to the resolution of this conflict, because the primacy of Union law was dealt with in a separate Declaration and not in the text of the Treaty itself.[39] And so the question as to who is to decide the ultimate boundaries of Union competences remains contentious, even though some authors try to calm the feelings by pointing out that, in practice, the Court of Justice and the national courts rarely deliver conflicting judgments.[40]

Not only has the precedence of Union rules over conflicting national rules been broadly accepted by the national courts, this book has shown that such conflicts are not as common as might be imagined. In practice, Union rules and national rules will often be applicable concurrently to a single set of facts without creating any conflicts whatsoever. In fact, we have found few examples of rules producing inconsistent outcomes. And even if the outcomes do differ, so that an election is required, we have seen that it will principally be up to the party concerned to rely upon the rule of his choice.[41] What is more, our findings confirm that the exclusive application of Union law can only be accepted on the basis of an inquiry into the wording, meaning and purpose of the provisions at issue. When viewed from the perspective of the individuals involved, therefore, the exclusion of one of the concurrently applicable rules appears to be the exception rather than the rule.[42]

Another point may be added. A large part of this book has been devoted to the legal reasoning of the Court of Justice of the European Union, a topic which has received considerable scholarly attention over the past decades. Several authors have submitted that the Court tends to expand rather than restrict the scope of application of Union law.[43] Beck, for instance, has argued that the Court suffers from a '*communautaire* predisposition', caused by the vague expressions and sweeping mission statements inserted into the Union legal texts.[44] In his view, it is 'more likely than not that the Court will adopt a *communautaire* solution to the question it has been asked'.[45] Our findings point in a different direction. We have seen that the Court leaves considerable room to the laws of the Member States, also when the Union legislature has not explicitly stated that the harmonising measure at issue is aimed at providing only a 'minimum' level of protection.[46] And even if the Union legislature has aimed at achieving a 'complete' harmonisation, national laws are only excluded by the Court if they clearly touch upon

38 Section 4.5.
39 Declaration No. 17 concerning primacy.
40 See e.g. De Búrca 2012, p. 454-455.
41 Section 6.6.
42 Section 6.7.
43 Bredimas 1978, p. 179; Rasmussen 1986, p. 561; Conway 2012, p. 21-50.
44 Beck 2012, p. 437.
45 Beck 2012, p. 330.
46 Section 6.5.

the topics which have been exhaustively regulated by the harmonisation scheme at issue.[47] When measured against the canon of interpretative techniques used by the supreme courts of the Member States, the approach adopted by the Court of Justice of the European Union does not seem to be overly activistic.

This book also raises a number of broader questions. We have examined the judgments delivered by the General Court and the Court of Justice of the European Union in order to discover how Union law answers the questions of concurrence raised.[48] National courts also play an important role within the Union judicial system. As organs of the Member States, they are under a duty to apply Union law in its entirety and to protect the rights which it confers on individuals.[49] From a practical perspective, moreover, most legal proceedings concerning the interpretation and application of Union law are ultimately resolved by the national courts.[50] It may be useful, therefore, to know whether they use the same scheme of analysis when they are asked to answer questions of concurrence in cases involving one or more Union rules. It is fair to assume that they will adopt the same approach. There are also some indications which point in this direction. The Supreme Court of the Netherlands has determined, for instance, that a contract which involves the purchase of a mobile phone in instalments may fall both within the scope of the rules governing instalment sale adopted by the Dutch legislature and the rules implementing the Consumer Credit Directive.[51] Indeed, the Supreme Court has confirmed that the consumer has a free choice as to which rule to rely upon.[52] Further research is needed, however, to establish whether the approach taken by national courts, acting as Union courts, is indeed in conformity with the approach outlined in this book.

Furthermore, this book raises the question of whether the same scheme of analysis may be used to debate and solve questions of concurrence arising in the context of vertical relationships, between an individual and an organ of a Member State or an institution of the Union. One could argue that the fundamental features of interpretation are universal and not bound to specific contexts.[53] It should not make a difference, then, whether the legal relationship involves a public authority or a private individual. However, it is also arguable that a public authority should not be granted the same freedom of choice as a private individual. In the Netherlands, for instance, public authorities may not escape the safeguards provided by public-law

47 Section 6.6.
48 See, on the scope and methodology of the present research, *supra* section 1.5.
49 Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, ECLI:EU:C:1978:49, at 14-16.
50 As observed e.g. by Rosas 2012, p. 105.
51 HR 13 June 2014, ECLI:NL:HR:2014:1385, *NJ* 2015/477, note J. Hijma (*Lindorff Purchase BV/Statia*), at 3.5.2.
52 See explicitly HR 12 February 2016, ECLI:NL:HR:2016:236, *NJ* 2017/282, note J. Hijma (*Lindorff BV/Nazier*), at 3.7.2. The same conclusion has been drawn by Van Boom 2014, p. 828.
53 See e.g. Conway 2012, p. 5.

arrangements by making use of their private-law powers.[54] The question of whether public authorities may rely upon the rule which appears to them to be the most advantageous may also be raised in jurisdictions which principally exclude such authorities from the scope of application of private law and subject them to the jurisdiction of the administrative courts. In both contexts, the question that arises is how, if at all, the general principles governing the administrative activities of such public authorities limit their freedom of choice.

Another factor may influence the resolution of a legal dispute. It has been observed that if a matter is taken to court, it is up to the claimant to allege the elements of the relevant rule of law in order to obtain the result sought and up to the defendant to put forward a reasoned defence. To some extent, the courts are bound to the facts and arguments submitted by these parties. However, the courts are also under a duty to assess and apply certain rules of their own motion. This duty may flow from the applicable law of civil procedure, but may also be imposed on the basis of the principle of effectiveness of Union law. Indeed, the Court of Justice has required national courts to apply Article 101 TFEU[55] and certain provisions contained in Union directives in the field of consumer law of their own motion.[56] These judgments do not call into question our findings, because they do not concern the relationship between the underlying rules as such. But they do suggest that the choice between the alternatives will not always be entirely up to the parties to the proceedings, but must sometimes be made by the court.[57] Further research is needed to establish the precise scope of the duty to examine Union law *ex officio* and the impact, if any, of the principle of effectiveness on the choices which can be made by the interested party in accordance with our scheme of analysis.[58] What if, for instance, one of the

54 HR 26 January 1990, ECLI:NL:HR:1990:AC0965, *NJ* 1991/393, note M. Scheltema (*Staat/Windmill*), at 3.2.

55 Case C-8/08, *T-Mobile Netherlands and Others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, at 49, with references to Case C-126/97, *Eco Swiss China Time v. Benetton International*, ECLI:EU:C:1999:269, at 36 and 39; Joined Cases C-295/04 to C-298/04, *Manfredi and Others*, ECLI:EU:C:2006:461, at 31 and 39.

56 Case C-377/14, *Ernst Georg Radlinger and Helena Radlingerová v. Finway*, ECLI:EU:C:2016:283, at 62. See also, with references to earlier case-law, Case C-488/11, *Asbeek Brusse v. Jahani*, ECLI:EU:C:2013:341, at 49-50; Case C-497/13, *Froukje Faber v. Autobedrijf Hazet Ochten*, ECLI:EU:C:2015:357, at 42.

57 See e.g. Case C-32/12, *Soledad Duarte Hueros v. Autociba and Automóviles Citroën España*, ECLI:EU:C:2013:637, at 43, where the Court held that a national court is obliged 'to grant of its own motion an appropriate reduction in the price of goods which are the subject of a contract of sale in the case where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity of those goods is minor (…)'.

58 See Castermans & Krans 2019, p. 117-119, who discuss questions of concurrence from a civil procedural law perspective. See about the duty to apply Union law *ex officio* also Ancery & Krans 2019, p. 131-135.

rules appears to him to be the most advantageous, but the national court is required to apply another rule as a matter of public policy?

Even though this book has not explicitly addressed these questions, it is submitted that our scheme of analysis may contribute to finding the appropriate answers. In accordance with this scheme, we should start from the premise that the objectives underlying each rule, however founded, should be realised to the greatest possible extent. In principle, then, each rule ought to have its intended legal effect once the necessary conditions have been established. In the interest of legal certainty, one rule should only affect the scope of application of another rule if a careful consideration of the wording, meaning and overall purpose of the provisions at issue necessitates this conclusion. It flows from this reasoning that the person concerned should, in principle, be free to elect the rule which appears to him to be the most advantageous.

Samenvatting (Dutch summary)

Samenloop in het Europees privaatrecht

Samenloop in privaatrechtelijke rechtsverhoudingen

Privaatrechtelijke rechtsverhoudingen worden door veel verschillende regels beheerst. Sommige regels zijn algemeen of open geformuleerd, andere regels zijn gesloten of specifiek van aard. Sommige regels zijn geworteld in een van de nationale systemen van vermogensrecht, andere regels vloeien voort uit het recht van de Europese Unie. De invloed van deze laatste categorie is de afgelopen decennia toegenomen. Het Unierecht dat betrekking heeft op non-discriminatie, mededingingsrecht, vrij verkeer en de interne markt roept rechten en verplichtingen in het leven die door private partijen tegenover andere private partijen kunnen worden afgedwongen.

In deze meergelaagde rechtsorde is het niet ongebruikelijk dat een privaatrechtelijke rechtsverhouding tegelijkertijd binnen de reikwijdte valt van verschillende EU-regels en daarnaast wordt beheerst door het toepasselijke nationale vermogensrecht. De toepassing van deze regels kan tot uiteenlopende resultaten leiden, bijvoorbeeld als de voorwaarden en rechtsgevolgen van de regels verschillen. Dan rijst de vraag of de belanghebbende mag kiezen op welke rechtsregel of -regels hij een beroep wenst te doen. Kunnen de regels naast elkaar worden toegepast, moet een keuze worden gemaakt of staat zelfs kiezen niet vrij en gaat een regel altijd voor?

In dit boek heb ik deze vragen van samenloop onderzocht. Het doel was de invloed van het recht van de Europese Unie op privaatrechtelijke rechtsverhoudingen beter te begrijpen. Vanwege dit Europeesrechtelijke perspectief heb ik er niet voor gekozen de terminologie van een van de bestaande systemen van vermogensrecht een-op-een over te nemen. Duits, Engels, Frans en Nederlands recht worden wel onderzocht, maar niet als model gehanteerd. Tegelijkertijd heb ik er niet voor gekozen de terminologie van de Uniewetgever en het Hof van Justitie van de Europese Unie een-op-een over te nemen. De Uniewetgever hanteert geen consistent begrippenapparaat en het Hof van Justitie spreekt slechts in algemene termen over rechten en verplichtingen zonder te preciseren welk type rechten en verplichtingen aan de orde is. Op dit punt is het Unierecht nog volop in ontwikkeling.[1]

1 § 1.2 en 4.2.

Aan deze ontwikkeling heb ik met dit boek een bijdrage willen leveren. Op basis van het begrippenapparaat dat is bedacht door Wesley Newcomb Hohfeld (1879-1918) en aan de hand van voorbeelden afkomstig uit de verschillende rechtsstelsels, heb ik uitgelegd over welke rechten en verplichtingen we eigenlijk spreken en schrijven als we spreken en schrijven over samenloop in het privaatrecht. De term *claim* wordt gebruikt om te verwijzen naar regels die een persoon een aanspraak geven op een prestatie van een andere persoon, zoals de vordering tot nakoming en de vordering tot schadevergoeding. De term *power* wordt gebruikt om te verwijzen naar de bevoegdheid van een persoon om een rechtstoestand of rechtsverhouding te creëren, te wijzigen of teniet te laten gaan. Te denken valt aan de ontbinding wegens tekortkoming of de vernietiging wegens dwaling. Ten slotte wordt aandacht besteed aan de verweermiddelen die ten dienste staan van de persoon die door het bestaan van een *claim* of het inroepen van een *power* wordt geraakt. In dit verband wordt de term *defence* gebruikt.[2]

Dit boek laat zien dat het geldende Unierecht inmiddels een aanzienlijk aantal *claims*, *powers* en *defences* in het leven roept. Private partijen mogen, bijvoorbeeld, niet discrimineren op grond van nationaliteit, het vrij verkeer van personen en diensten niet beperken en de mededinging niet verhinderen, beperken of vervalsen. Schending van deze regels – die zijn opgenomen in het VWEU – resulteert, als aan de desbetreffende vereisten is voldaan, in een vordering tot schadevergoeding. Tegen deze vordering kan de aangesproken partij zich op zijn beurt met verschillende middelen verweren. Ook in de door de Uniewetgever aangenomen verordeningen en richtlijnen vinden we talrijke *claims*, *powers* en *defences* terug. Dit boek brengt deze rechten en verplichtingen in kaart en biedt daarmee een overzicht van de Unierechtelijke regels die voor private partijen relevant zijn.[3]

Niet de vorm, maar de inhoud is bepalend

Hoe moet de verhouding tussen deze *claims*, *powers* en *defences* worden bepaald? Het is verleidelijk om deze vraag te beantwoorden op basis van een formeel criterium. Men hamert er bijvoorbeeld op dat het Unierecht voorrang heeft op het nationale recht, dat richtlijnen en verordeningen in de plaats komen van nationale regels en dat speciale regels voorrang hebben op algemene regels. In dit boek heb ik onderschreven dat Unierecht voorrang *kan* hebben op het nationale recht, dat richtlijnen en verordeningen in de plaats *kunnen* komen van nationale regels en dat speciale regels voorrang *kunnen* hebben op algemene regels. Tegelijkertijd heb ik betoogd dat de

2 § 1.3 en 2.3.
3 § 4.3-4.4.

vraag *of* een regel voorrang heeft een vraag van uitleg is die niet op basis van een formeel criterium kan worden beantwoord. De hiervoor geschetste benaderingen moeten daarom worden genuanceerd. Niet slechts de formele verhouding tussen de betrokken regels is van belang, ook hun inhoud moet worden beoordeeld.[4]

Neem het bekende adagium *lex specialis derogat legi generali*. Met een beroep op deze slagzin neemt menig jurist aan dat een bijzondere regel voorrang heeft op een algemene regel als beide op hetzelfde feitencomplex van toepassing zijn. Dit boek laat zien dat de werkelijkheid weerbarstiger is, zowel in de nationale stelsels als in het Unierecht. Om te beginnen moet er daadwerkelijk sprake zijn van een algemene regel en een bijzondere regel. Het boek laat zien dat dit slechts het geval kan zijn als de algemene regel alle gevallen bestrijkt waarop de bijzondere regel van toepassing is, maar de bijzondere regel niet alle gevallen bestrijkt waarop de algemene regel van toepassing is. Alleen dan is werkelijk sprake van een *lex specialis*.[5] Dit betekent dat, bijvoorbeeld, artikel 18 VWEU over non-discriminatie op basis van nationaliteit niet langer als *lex generalis* kan worden gezien ten opzichte van de verdragsbepalingen op het gebied van het vrij verkeer van personen en diensten. Sinds het Hof van Justitie heeft geoordeeld dat ook non-discriminatoire beperkingen in strijd kunnen zijn met het vrij verkeer kan niet langer worden volgehouden dat artikel 18 VWEU alle beperkingen op het vrij verkeer beheerst.[6]

Zelfs als sprake is van een *lex generalis* en een *lex specialis*, dan is dit geen dwingende reden om aan te nemen dat de laatste regel exclusieve werking toekomt. Mogelijk vult de bijzondere regel de algemene regel slechts aan, zoals het geval is met de richtlijnen die specifieke aspecten van oneerlijke handelspraktijken regelen.[7] Duidelijk is wel dat een uitzondering zal moeten worden gemaakt als de regels conflicteren. Dan moet een van beide regels wijken. Maar de vraag of dit het geval is, en welke regel dan buiten toepassing moet worden gelaten, is een vraag van uitleg die moet worden beantwoord aan de hand van de aard en strekking van de betrokken regels en de verdere omstandigheden van het geval.[8]

Net zo min als bijzondere regels noodzakelijkerwijs voorrang hebben op algemene regels hebben Unierechtelijke regels noodzakelijkerwijs voorrang op nationale regels. Het beginsel van voorrang van Unierecht is in essentie een conflictregel. Het vertelt ons slechts *welke* regel voorrang moet hebben, niet *of* sprake is van een conflict dat moet worden opgelost. Ook deze laatste vraag is een vraag van uitleg die niet kan worden beantwoord door te wijzen op de formele of hiërarchische verhouding tussen de betrokken

4 § 1.1.
5 § 2.4, 5.2.4, 6.3 en 6.7.
6 § 5.2.2-5.2.5.
7 § 6.7.
8 § 2.4, 5.2.5, 6.3 en 6.7.

regels.[9] Hetzelfde geldt voor de vraag of een richtlijn of verordening in de plaats komt van het nationale recht. Dat deze wetgevingsinstrumenten zijn gericht op harmonisatie betekent niet dat ze de toepassing van andere regels noodzakelijkerwijs uitsluiten. De bevoegdheid van de Uniewetgever om de interne markt te harmoniseren is immers beperkt en de door hem aangenomen regels zijn niet steeds uitputtend bedoeld.[10]

Een gedeeld interpretatiemodel

Hoe zouden we dan wél moeten bepalen of het recht de belanghebbende toestaat om zich op de regel van zijn keuze te beroepen? Dit boek laat zien dat de stelsels die zijn bestudeerd – Duits, Engels, Frans en Nederlands recht – deze vraag op dezelfde wijze benaderen en oplossen.[11] Het boek laat ook zien dat dezelfde benadering wordt gevolgd door de Uniewetgever en door het Hof van Justitie.

In al deze stelsels geldt het uitgangspunt dat elke regel zoveel mogelijk tot zijn recht moet komen. In beginsel wordt het toepassingsbereik van een regel daarom niet door een andere regel beperkt. Zo moet het handelen van particulieren dat valt binnen het toepassingsbereik van het Unierecht in overeenstemming zijn met alle verplichtingen die voortvloeien uit de verdragsbepalingen op het gebied van non-discriminatie, vrij verkeer van personen en diensten, en mededingingsrecht.[12] De toepasselijkheid van een verdragsbepaling leidt er in beginsel niet toe dat een andere verdragsbepaling buiten toepassing dient te blijven.[13] Hetzelfde uitgangspunt wordt gehanteerd bij het bepalen van de verhouding tussen regels van secundair Unierecht,[14] en tussen secundair Unierecht en nationaal recht.[15] Steeds geldt dat de regels naast elkaar kunnen worden toegepast als aan de vereisten van de regels is voldaan. In dit verband spreken juristen in de verschillende stelsels over het *cumuleren* of *combineren* van de regels. De belanghebbende mag in deze gevallen kiezen op welke regel of regels hij een beroep wenst te doen.

Soms kunnen de rechtsgevolgen van de regels niet gelijktijdig intreden, omdat dit tot logisch of praktisch onaanvaardbare resultaten zou leiden. Zo kan men er niet voor kiezen de overeenkomst te ontbinden en tevens nakoming te vorderen van de verbintenissen uit dezelfde overeenkomst.

9 § 4.5.
10 § 4.5, 6.2-6.5.
11 § 2.5.
12 § 5.2.4 en 5.4.3.
13 § 5.3.5 en § 5.4.3.
14 § 6.2-6.3.
15 § 6.4-6.5.

In dergelijke gevallen is het maken van een keuze tussen de regels vereist en verplicht. Men spreekt ook wel van het hebben van een *optie* en over *alternativiteit*. In beginsel is het, zowel in de nationale stelsels als in het Unierecht, aan de belanghebbende om te kiezen voor de regel die in zijn ogen het meest gunstig is, hetgeen goed tot uitdrukking komt in de Engelse term 'election'.[16]

Soms is er geen ruimte voor een keuze, omdat de ene regel de andere regel geheel of gedeeltelijk verdringt. Als de wetgever een bepaalde situatie uitputtend heeft willen regelen, dan kan het niet zo zijn dat via een omweg toch een ander resultaat wordt bereikt. Men spreekt ook wel van *exclusiviteit.* Dit boek laat zien dat deze oplossing met terughoudendheid moet worden toegepast. Het toepassingsbereik van een regel wordt slechts beperkt voor zover dit nodig is om de exclusieve regel tot zijn recht te laten komen. Voor exclusieve werking moeten bovendien duidelijke aanwijzingen bestaan, bijvoorbeeld omdat de regels dit met zoveel woorden voorschrijven of onvermijdelijk meebrengen. Dat een richtlijn of verordening 'maximumharmonisatie' beoogt, wil daarom niet zeggen dat andere regels niet gelden. Steeds zal, op basis van de bewoordingen, aard en strekking van de betrokken regels, moeten worden onderzocht of de richtlijn of verordening exclusieve werking heeft.[17] Is dit niet het geval, dan kunnen de regels naast elkaar worden toegepast of mag een keuze tussen de regels worden gemaakt.[18]

De conclusie van het boek luidt dat het interpretatiemodel dat is ontwikkeld in de nationale stelsels van vermogensrecht kan zorgen voor een beter begrip van de invloed van het Unierecht op privaatrechtelijke rechtsverhoudingen. In dit model wordt het uitgangspunt gehanteerd dat elke regel zoveel mogelijk tot zijn recht moet komen. Dit betekent dat elke regel op zijn eigen merites moet worden beoordeeld en steeds kan worden toegepast zodra de noodzakelijke vereisten zijn vervuld. Hieruit vloeit voort dat de belanghebbende vrijelijk mag kiezen op welke regel of regels hij een beroep wenst te doen. Er zijn slechts twee uitzonderingen. De belanghebbende moet een keuze maken tussen de beschikbare alternatieven als gelijktijdige toepassing van de regels tot logisch of praktisch onaanvaardbare resultaten zou leiden. En soms mag hij geen keuze maken, omdat een van de regels exclusieve werking heeft. Deze uitzonderingen behoeven rechtvaardiging, omdat ernaar moet worden gestreefd elke regel, ongeacht zijn grondslag, zoveel mogelijk tot zijn recht te laten komen.

16 § 2.5 en 6.6.
17 § 6.7.
18 § 2.5, 5.3.5, 5.4.3 en 6.3.

Treaties and Legislation

International treaties

CIV Uniform Rules
Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV), appendix to the Convention concerning International Carriage by Rail of 9 May 1980.

Montreal Convention
Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999.

European Union law

Primary law

TFEU
Consolidated Version of the Treaty on the Functioning of the European Union [2007] OJ C326/01.

TEU
Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

The Charter
Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

Declaration No. 17 concerning primacy
Declaration No. 17 concerning primacy [2007] OJ C115/344.

Explanations relating to the Charter
Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

Protocol No. 25 on the exercise of shared competence
Protocol No. 25 on the exercise of shared competence (annexed to the TFEU) [2008] OJ C115/307.

Protocol No. 27 on the internal market and competition
Protocol No. 27 on the internal Market and competition (annexed to the TFEU) [2008] OJ C115/309.

Secondary legislation

Directives

Directive 76/207/EEC (no longer in force)
Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L039/40.

Directive 84/450/EEC (no longer in force)
Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/17.

Directive 85/374/EEC
Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L2010/29.

Directive 85/577/EEC (no longer in force)
Council Directive 85/577/EEC of 20 December 1985 on the protection of consumers in respect of contracts negotiated away from business premises [1985] OJ L372/31.

Directive 86/653/EEC
Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17.

Directive 87/102/EEC (no longer in force)
Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1986] OJ L042/48.

Directive 90/314/EEC (no longer in force)
Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59.

Directive 93/13/EEC
Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

Directive 94/47/EC (no longer in force)
Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L280/83.

Directive 95/46/EC (no longer in force)
Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

Directive 96/9/EC
Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.

Directive 97/7/EC (no longer in force)
Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19.

Directive 1999/44/EC
Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

Directive 2000/31/EC
Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market *(Directive on electronic commerce)* [2000] OJ L178/1.

Directive 2000/43/EC
Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

Directive 2000/78/EC
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

Directive 2001/29/EC
Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

Directive 2001/83/EC
Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L311/67.

Directive 2002/22/EC
Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services *(Universal Service Directive)* [2002] OJ L108/51.

Directive 2002/65/EC
Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services [2002] OJ L271/16.

Directive 2003/88/EC
Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9.

Directive 2004/48/EC
Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/45.

Directive 2005/29/EC
Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council *(Unfair Commercial Practices Directive)* [2005] OJ L149/22.

Directive 2006/114/EC
Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/21.

Directive 2006/115/EC
Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28.

Directive 2006/123/EC
Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

Directive 2008/48/EC
Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66.

Directive 2008/122/EC
Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] OJ L33/10.

Directive 2009/24/EC
Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16.

Directive 2009/138/EC
Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance *(Solvency II)* [2009] OJ L335/1.

Directive 2010/30/EU (no longer in force)
Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products [2010] OJ L153/1.

Directive 2011/7/EU
Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [2011] OJ L48/1.

Directive 2011/83/EU
Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

Directive 2014/17/EU
Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L60/34.

Directive 2014/104/EU
Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

Directive 2015/2302/EU
Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1.

Directive 2015/2366/EU
Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35.

Directive 2016/943/EU
Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1.

Directive 2017/1132/EU
Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L169/46.

Directive 2019/770/EU
Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1.

Directive 2019/771/EU
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Curriculum vitae

Ruben de Graaff was born in 1988, in Delft, the Netherlands. After finishing his pre-university education at the Grotius College in Delft, he studied law at Leiden University. In 2013, he finished his Masters in Civil Law and in European Law. From 2013 until 2019, he worked as a PhD candidate and lecturer at the Institute for Private Law. In 2017, he was a visiting research fellow at the Ludwig-Maximilians-Universität in Munich, Germany. Since 2020, he works as an attorney-at-law at the law firm Pels Rijcken & Droogleever Fortuijn, in the Hague, the Netherlands.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2019 and 2020:

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